# TRANSCRIPT OF RECORD.

## SUPREME COURT OF THE UNITED STATES.

**OCTOBER TERM, 1890.**

No. ~~1105~~. 645

THE PEOPLE OF THE STATE OF NEW YORK EX REL. FRANCIS E. PINTO, PLAINTIFF IN ERROR,

*vs.*

ANDREW WALSH, POLICE JUSTICE OF THE CITY OF BROOKLYN, AND CLARK D. RHINEHART, SHERIFF OF THE COUNTY OF KINGS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

**FILED JANUARY 21, 1890.**

profit exceed what the owners of the grain or those engaged in its transportation can afford to pay, the result will then be that the persons so engaged will cease from that kind of work, or else the owners of the elevators will reduce their charges. This reduction of charges will most surely take place before the owners of the elevators would allow the business to pass out of existence, provided the compensation after such reduction would enable them to realize the average rate of profit for their capital; while, if it would not, it would be conclusive proof that the business of transportation of grain or other commodities where the boats were to be loaded or unloaded by elevators could no longer be conducted with profit to all parties, and some new way would have to be discovered and put in practice, for capital will not seek investment or employment where the average rate of profit cannot be commanded, and men will not continue to transport grain or any other commodity at a loss or upon such terms that they cannot earn a livelihood. If this is the case in the transportation of grain by the canal, owing to the competition of railroads and their ability to transport it cheaply and rapidly, then that fact must be faced. Such a business cannot be maintained for any length of time by legislation at the expense either of capital or of the transporter. Each must earn the average profit in the same general line of business, or the business must, from economical reasons, cease.

The legislation under consideration is not only vicious in its nature, communistic in its tendency, and, in my belief, wholly
139 inefficient to permanently obtain the result aimed at, but, for the reasons already given, it is an illegal effort to interfere with the lawful privilege of the individual to seek and obtain such compensation as he can for the use of his own property, where he neither asks nor receives from the sovereign power any special right or immunity not given to and possessed by every other citizen, and where he has not devoted his property to any public use within the meaning of the law.

The orders of the general and special terms of the supreme court should, therefore, be reversed, and the relators discharged.

"Gray, J., concurs."

A copy. H. E. SICKELS, *Reporter*. C.

140 [Endorsed:] Supreme Court U. S. 1889, October term. Nos. 1546 & 1547. The People *ex rel.* Annan *vs.* Walsh, police justice, &c.; The People *ex rel.* Pinto *vs.* Walsh, police justice, &c. Certified copies of opinions in cases of People *vs.* Budd and People *ex rel.* Annan *vs.* Walsh; People *ex rel.* Pinto *vs.* Walsh.

[Stamped:] Office Supreme Court U. S. Filed Jan. 21, 1890. James H. McKenney, clerk.

Endorsed on cover: New York supreme court. No. 1104. The People of the State of New York *ex rel.* Edward Annan, plaintiff in error, *vs.* Andrew Walsh, police justice of the city of Brooklyn, & Clark D. Rhinehart, sheriff of the county of Kings. Filed January 21, 1890.

# TRANSCRIPT OF RECORD.

## SUPREME COURT OF THE UNITED STATES.

**OCTOBER TERM, 1890.**

No. ~~1405~~. 645

THE PEOPLE OF THE STATE OF NEW YORK EX REL. FRANCIS E. PINTO, PLAINTIFF IN ERROR,

*vs.*

ANDREW WALSH, POLICE JUSTICE OF THE CITY OF BROOKLYN, AND CLARK D. RHINEHART, SHERIFF OF THE COUNTY OF KINGS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

**FILED JANUARY 21, 1890.**

# SUPREME COURT OF THE UNITED STATES.

## OCTOBER TERM, 1890.

No. 1105.

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THE PEOPLE OF THE STATE OF NEW YORK EX REL. FRANCIS E. PINTO, PLAINTIFF IN ERROR,

*vs.*

ANDREW WALSH, POLICE JUSTICE OF THE CITY OF BROOKLYN, AND CLARK D. RHINEHART, SHERIFF OF THE COUNTY OF KINGS.

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IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

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*a* In obedience to the writ of error annexed hereto, issued by the Supreme Court of the United States on the 9th day of December, 1889, the annexed transcript of the record of this court, with copies of all the papers and proceedings in the above suit filed and remaining of record in this court, are hereby certified and sent to the said Supreme Court of the United States, as in said writ directed.

Seal Kings County. Given under my hand and seal this 14th day of January, 1890.

WM. J. KAISER, *Clerk.*

*b* UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of the State of New York, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment in a plea which is in the said supreme court, before you or some of you, said judgment having been affirmed by the court of appeals of the State of New York, being the highest court of the State of New York in which a decision could be had in the said suits between the People of the State of New York at the relation of Francis E. Pinto and Andrew Walsh, police justice of the city of Brooklyn, and between the People of the State of New York at the relation of Francis E. Pinto and Clark D. Rhinehart, sheriff of the county of Kings, and the record having been remitted from said court of appeals to your court, wherein was drawn in question the validity of a statute or an authority exercised under the United States and the decision was against their validity; or wherein was drawn in question the validity of a statute or an authority exercised under said State on the grounds of their being repugnant to the Constitution or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution of the United States, and the decision was against the right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, a *c* manifest error hath happened, to the great damage of the said Francis E. Pinto, as by his complaint appears, we, being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the party aforesaid on this behalf, do command you, if judgment be therein given, that under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the second Monday of October, eighteen hundred and ninety, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done thereon to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Hon. Melville W. Fuller, Chief Justice of the said Su-

preme Court, the fifth day of December, in the year of our Lord one thousand eight hundred and eighty-nine.

[Seal of the Supreme Court of the United States.]

JAMES H. McKENNEY,
*Clerk of the Supreme Court of the United States.*

The foregoing writ is hereby allowed.
Dec. 5, 1889.

SAM'L BLATCHFORD,
*Associate Justice of the Supreme Court of the United States.*

[Endorsed:] 40, 464. Supreme Court of the United States. The People of the State of New York *ex rel.* Francis E. Pinto, plaintiff in error, against Andrew Walsh, police justice of the city of Brooklyn, and Clark D. Rhinehart, sheriff of the county of Kings, defendants in error. Writ of error. Bergen & Dykman, attorneys for plaintiff in error, 189 Montague street, Brooklyn, N. Y. To ——— ———, Esq., attorney for —. Filed Dec. 9, 1889. E.

*d* Court of Appeals.

STATE OF NEW YORK, *ss:*

Pleas in the court of appeals, held at the capitol, in the city of Albany, on the 15th day of October, in the year of our Lord one thousand eight hundred and eighty—, before the judges of said court.

Witness the Hon. William C. Ruger, chief justice, presiding.
GORHAM PARKS, *Clerk.*

*Remittitur, October 15th,* 1889.

*e* In the Matter of the Application of FRANCIS E. PINTO for a Writ of *Habeas Corpus* and a Writ of Certiorari to Inquire into the Cause of His Imprisonment.

Be it remembered that on the 23rd day of October, in the year of our Lord one thousand eight hundred and eighty-eight, Francis E. Pinto, the appellant in this action, came here into the court of appeals, by Bergen & Dykman, Esqrs., attorney-, and filed in the said court a notice of appeal and return thereto from an order of the general term of the supreme court of the State of New York; and Clark D. Rhinehart, as sheriff, &. Andrew Walsh, as police justice, &c., the respondent- in said action, afterwards appeared in said court of appeals by Hon. James W. Ridgway, district attorney.

*f* Which said notice of appeal and the return thereto filed as aforesaid are hereunto annexed.

Whereupon the said court of appeals, having heard this cause argued by Mr. William N. Dykman, of counsel for the appellant, and by Mr. J. A. Hyland, of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the order

of the general term of the supreme court appealed from to this court be, and the same is hereby, affirmed.

And it was also further ordered that the record aforesaid and the proceedings in this court be remitted to the said supreme court, there to be proceeded upon according to law.

*g* Therefore it is considered that the said order be affirmed as aforesaid.

And hereupon, as well *as* the notice of appeal and return thereto aforesaid as the judgment of the court of appeals aforesaid, by them given in the premises, are by the said court of appeals remitted into the supreme court of the State of New York, before the justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said supreme court before the justices thereof, &c.

GORHAM PARKS,
*Clerk of the Court of Appeals of the State of New York.*

Court of appeals, clerk's office.

ALBANY, —— —, 189–.

[L. S.] I hereby certify that the preceding record contains a correct transcript of the proceedings in said action in the court of appeals, with the papers originally filed therein attached thereto.

GORHAM PARKS, *Clerk.*

*h* Court of Appeals of the State of New York.

THE PEOPLE *ex Rel.* FRANCIS E. PINTO, Appellant,
*against*
ANDREW WALSH, Police Justice of the City of Brooklyn, Respondent.

THE PEOPLE *ex Rel.* FRANCIS E. PINTO, Appellant,
*against*
CLARK D. RHINEHART, Sheriff of the County of Kings, Respondent.

*Appeal Book.*

Bergen & Dykman, attorneys for appellants, 189 Montague St., Brooklyn, N. Y.; Hyland & Zabriskie, attorneys for respondents, 45 Broadway, New York.

1 Supreme Court.

In the Matter of the Application of FRANCIS E. PINTO for a Writ of *Habeas Corpus.*

This matter was brought before the supreme court at general term, in the second department, in the first instance, by writs of *habeas corpus* and certiorari, to inquire into the detention of Francis E. Pinto, who was arrested and imprisoned for a violation of chapter 581 of

the laws of 1888, forbidding the charge of more than specified rates for elevating grain.

The writs were dismissed by the general term and the prisoner remanded on October 1, 1888.

There has been no change of parties.

BERGEN & DYKMAN,
*Attorneys for Relator-Appellant.*

2 "A."

The people of the State of New York to the sheriff of Kings county, Greeting:

[SEAL.] *Hab. corpus* to bring up person.

We command you that you have the body of Francis E. Pinto, by you imprisoned and detained, as it is said, together with the time and cause of such imprisonment and detention, by whatsoever name the said Francis E. Pinto is called or charged, before our supreme court, at a general term to be held in the court-house, in the city of Poughkeepsie, on the 25th day of June, eighteen hundred and eighty-eight, at eleven o'clock in the forenoon, to do and receive what shall then and there be considered concerning Francis E. Pinto; and have you then there this writ.

Witness Hon. C. E. Pratt, one of the justices of our supreme court, the 22d day of June, one thousand eight hundred and eighty-eight.

JOHN M. RANKEN, *Clerk.*

BERGEN & DYKMAN, *Attorneys.*

3 *Writ of Habeas Corpus.*

Supreme Court.

In the Matter of the Application of FRANCIS E. PINTO for a Writ of *Habeas Corpus.*

BERGEN & DYKMAN,
*Relator's Attorneys*, 189 *Montague St., Brooklyn.*

Allowed this 22d day of June, 1888, on application of Francis E. Pinto.

Notice to the district attorney of Kings county served on or before the 23d day of June, 1888, shall be sufficient.

C. E. PRATT, *J. S. C.*

To the supreme court of the State of New York:

The petition of Francis E. Pinto respectfully shows:

I. That he is now imprisoned or restrained in his liberty by the sheriff of Kings county.

II. That your petitioner was not committed and is not de-
4 tained by virtue of a mandate issued by a court or a judge of the United States in a case where such courts or judges have exclusive jurisdiction under the laws of the United States or have acquired exclusive jurisdiction by the commencement of legal pro-

ceedings in such a court; and your petitioner further shows that he was not committed and is not detained by virtue of the final judgment or decree of a competent tribunal of civil or criminal jurisdiction or the final order of such a tribunal made in a special proceeding instituted for any cause except to punish him for contempt, or by virtue of an execution or other process issued upon such judgment, decree, or final order.

III. Your petitioner further shows that the cause or pretence of his imprisonment and restraint, according to the best knowledge and belief of your petitioner, is that he is charged with having committed a misdemeanor by violating and offending against the provisions of an act of the Legislature of the State of New York entitled "An act to regulate the fees and charges for elevating, trimming, receiving, weighing, and discharging grain by means of floating and stationary elevators and warehouses in this State," passed June 9, 1888, being chapter 581 of the laws of 1888, and that his offence is that he has charged more than five-eighths of one cent a bushel for elevating, receiving, weighing, and discharging grain, and has charged against a canal boat or ocean steamer more than the actual cost of trimming or shoveling grain to the leg of the elevator.

IV. Your petitioner further shows that he is advised by his counsel, William N. Dykman, Esq., residing at 171 Cumberland street, in the city of Brooklyn, and verily believes, that his imprisonment and restraint is illegal, and that such illegality consists in this, that the said act is unconstitutional and void, being in contravention of the constitution of the State of New York and in contravention of the Constitution of the United States.

Wherefore your petitioner prays a writ of *habeas corpus* to inquire into the cause of such imprisonment or restraint.

FRANCIS E. PINTO.

COUNTY OF KINGS, *ss:*

Francis E. Pinto, being duly sworn, says that he has heard read the foregoing petition subscribed by him and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated on information and belief, and that as to those matters he believes it to be true.

FRANCIS E. PINTO.

Sworn to before me this 22d day of June, 1888.

A. F. BRITTON,
*Notary Public, Kings County.*

The people of the State of New York to Andrew Walsh, police justice of the city of Brooklyn, Greeting:

[SEAL.]

Certiorari to certify cause of detention.

We command you that you certify fully and at large to our supreme court and to the justices of our supreme court, at a general term thereof, to be held in the court-house, in the city of Poughkeepsie, on the 25th day of June, 1888, at 11 o'clock in the forenoon, the day and cause of the imprisonment of Francis E. Pinto, by you detained, as is said, by

whatsoever name the said Francis E. Pinto shall be called or charged; and have you then this writ.

Witness Hon. C. E. Pratt, one of the justices of our supreme court, this 22d day of June, 1888.

JOHN M. RANKEN, *Clerk.*

BERGEN & DYKMAN, *Attorneys.*

7 *Writ of Certiorari.*

Supreme Court.

In the Matter of the Application of FRANCIS E. PINTO for a Writ of Certiorari.

BERGEN & DYKMAN,
*Relator's Attorneys*, 189 *Montague Street, Brooklyn.*

Allowed this 22d day of June, 1888, on application of Francis E. Pinto.

Notice to the district attorney of Kings county served on or before the 23d day of June, 1888, shall be sufficient.

C. E. PRATT, *J. S. C.*

To the supreme court of the State of New York:

The petition of Francis E. Pinto respectfully shows:

I. That he is now imprisoned or restrained in his liberty by the sheriff of Kings county, having been thereunto committed by Hon. Andrew Walsh, police justice of the city of Brooklyn.

II. That your petitioner was not committed and is not detained by virtue of a mandate issued by a court or a judge of the United States in a case where such courts or judges have exclusive juris-
8 diction under the laws of the United States or have acquired exclusive jurisdiction by the commencement of legal proceedings in such a court; and your petitioner further shows that he was not committed and is not detained by virtue of the final judgment or decree of a competent tribunal of civil or criminal jurisdiction or the final order of such a tribunal made in a special proceeding instituted for any cause except to punish him for contempt, or by virtue of an execution or other process issued upon such judgment, decree, or final order.

III. Your petitioner further shows that the cause or pretense of his imprisonment and restraint, according to the best knowledge and belief of your petitioner, is that he is charged with having committed a misdemeanor by violating and offending against the provisions of an act of the Legislature of the State of New York entitled "An act to regulate the fees and charges for elevating, trimming, receiving, weighing, and discharging grain by means of floating and stationary elevators and warehouses in this State," passed June 9, 1888, being chapter 581 of the laws of 1888, and that his offence is that he has charged more than five-eighths of one cent a bushel

for elevating, receiving, weighing, and discharging grain, and has charged against a canal boat or ocean steamer more than the actual cost of trimming or shoveling grain to the leg of the elevator.

IV. Your petitioner further shows that he is advised by his counsel, William N. Dykman, Esq., residing at 171 Cumberland street, in the city of Brooklyn, and verily believes, that his imprisonment and restraint is illegal, and that such illegality consists in this, that the said act is unconstitutional and void, being in con-
9 travention of the constitution of the State of New York and in contravention of the Constitution of the United States.

Wherefore your petitioner prays a writ of certiorari to inquire into the cause of such imprisonment or restraint.

FRANCIS E. PINTO.

COUNTY OF KINGS, *ss:*

Francis E. Pinto, being duly sworn, says that he has heard read the foregoing petition subscribed by him and knows the contents thereof, and that the same is true of his own knowledge except as to the matters therein stated on information and belief, and that as to those matters he believes it to be true.

FRANCIS E. PINTO.

Sworn to before me this 22d day of June, 1888.

A. F. BRITTON,
*Notary Public, Kings County.*

The undersigned, sheriff of the county of Kings, respectfully returns and says that he received the annexed paper marked "A" on the 22d day of June, 1888, at 2 o'clock and 20 minutes p. m., at which time there was in his custody the body of Francis E. Pinto, who he believes to be the person named in said paper marked "A" and who was so there in his custody as being the person named in an original paper, of which the annexed paper marked "B" is a copy, and the original whereof I now produce.

10 And so returning the undersigned produces the body of said person in obedience to the command expressed in paper "A."

Brooklyn, June 22d, 1888.

CLARK D. RHINEHART, *Sheriff.*

The paper referred to in the above return marked "A" is the writ of *habeas corpus* and the paper marked "B" is the commitment.

To the supreme court:

In obedience to the writ of certiorari hereunto annexed I certify and return that on the 22d day of June, 1888, one Adam R. Gray made complaint to the undersigned against Francis E. Pinto for a violation of chapter 581 of the laws of 1888. A copy of the information or affidavit is hereunto annexed, marked "A."

The defendant, Francis E. Pinto, was in court on that day with his

counsel. An examination of the witnesses was reduced to writing and is hereunto annexed, marked "C."

I held the defendant, Francis E. Pinto, for trial and committed him to the custody of the sheriff of Kings county, and a copy of the commitment is hereunto annexed, marked "B."

All of which is respectfully submitted.

Dated Brooklyn, June 23, 1888.

ANDREW WALSH,
*Police Justice.*

11 Before Andrew Walsh, police justice, city-hall district.

THE PEOPLE OF THE STATE OF NEW YORK
*against*
FRANCIS E. PINTO.

Defendant arraigned June 22, 1880.

The charge specified in the information and the depositions taken thereon were distinctly read to defendant. He was informed of the same and of his right to the aid of counsel in every stage of the proceeding, and a reasonable time was allowed him to send for and advise with counsel.

STATE OF NEW YORK, *County of Kings*, } *ss:*

Adam R. Gray, being duly sworn, deposes and says that he resides in the city of Brooklyn, State of New York; that on the 21st day of June, 1888, in said city of Brooklyn, one Francis E. Pinto did wilfully and unlawfully violate the provisions of chapter 581 of the laws of 1888 relating to the charges for elevating, receiving, weighing, and discharging grain, by means of floating and stationary elevators, in that he did, on said 21st day of June, 1888, charge and exact from this deponent more than five-eighths of one cent per bushel for receiving and weighing a cargo of grain from the boat Bessemer into the Pinto Stores, of which he, Francis Pinto, is the
12 lessee and manager, and in that he did at said day and place charge and exact more than the actual cost of trimming or shoveling to the leg of the elevator.

ADAM R. GRAY.

Subscribed and sworn to before me this 22d day of June, 1888.
ANDREW WALSH,
*Police Justice.*

STATE OF NEW YORK, *County of Kings*, } *ss:*

In the name of the people of the State of New York, to any policeman of the city of Brooklyn:

Information upon oath having been this day laid before me that the crime of misdemeanor has been committed on the 21st day of June, 1888, and accusing Francis E. Pinto thereof:

You are therefore commanded forthwith to arrest the above-named Pinto and bring him before me, at my court-room, 318 to 322 Adams street, in said city of Brooklyn, or, in case of my absence or inability to act, before the nearest or most accessible magistrate in said city.

Dated at the city of Brooklyn this 22d day of June, 1888.

ANDREW WALSH,
*Police Justice of the City of Brooklyn.*

13 EDWARD ANNAN, called on behalf of defence, being duly sworn, testified as follows:

Examined by Mr. DYKMAN:

Q. You are one of the owners of the Ceres?
A. Yes, sir.
Q. Who are the other owners? Are they all private parties?
A. All private parties.
Q. Individuals?
A. Individuals.
Q. No corporation or company has any interest in the Ceres, has it?
A. No, sir.
Q. What is your ownership in the Ceres?
A. I think it is $\frac{3}{48}$.
Q. Who are the agents of the Ceres?
A. Annan — Co.
Q. Annan & Co. is a copartnership firm?
A. Yes, sir.
Q. Composed of whom?
A. Edward Annan, John B. McCue, and E. G. Burgess.
Q. Have you any competitors in that business, Mr. Annan?
A. Yes, sir.
Q. How many?
A. Several.
Q. In floaters?
A. In the floaters.
Q. Are your competitors with the warehouses along shore?
A. Yes, sir.
Q. Will you describe the work which a floating elevator does?
A. It takes the grain from the canal boat, elevates it,
14 weighs it, and delivers it to the ship.
Q. The floating elevator is a boat, is it not?
A. Yes, sir.
Q. Ordinarily a steam-propeller?
A. We have both steam-propellers and scows.
Q. And do they have towers above deck?
A. Yes, sir.
Q. Which have a machinery for elevating grain?
A. Yes, sir.
Q. And weighing it and discharging it?
A. Yes, sir.

Q. What machinery have the shore warehouses to do the same work?

A. They have the towers; they have the same machinery practically.

Q. The same machinery?

A. The same machinery.

Q. How much competition has there been in this business, say, for the last two years?

A. It has been fierce all the way through.

Q. Can you describe it in its effect on the profits?

A. Yes, sir.

Q. Do so.

A. The floating elevators have not been able to earn a dividend for nearly two years.

Q. Are you a member of the produce exchange?

A. Yes, sir.

Q. (Handing book to witness.) Do you recognize the book I show you?

A. Yes, sir.

Q. The Produce Exchange Annual Report, 1885–86?

A. Yes, sir; I do.

Mr. Dykman offers in evidence that part of page 103 which shows that there are six firms operating thirty-one floating elevators, and that — twenty-two stationary warehouses for grain. It is admitted.

Q. Will you describe how the schedule of prices contained in this produce-exchange book for elevating, weighing, receiving, and discharging grain was made up—between whom?

A. Between the receiver and the buyer and the agent of the ship and canal boat.

Q. You misunderstand me. There was a schedule of charges?

A. That was made up by the produce exchange.

Q. Is there a part of the members of the produce exchange generally known as the grain trade?

A. Yes, sir.

Q. And has that trade a committee?

A. Yes, sir.

Q. Who were those members of the produce exchange called the grain trade?

A. They are members that deal almost exclusively in grain.

Q. And they are the members concerned in the price for handling grain?

A. They are.

Q. Who was it that made the agreement with the floating-elevator men and the shore warehousemen for the schedule of prices?

A. These rules were gotten up by the grain committee and submitted to the members of the produce exchange to vote on.

Q. What control has the produce exchange over the shore warehouses?

A. They give them a license.

Q. And what about the warehouse receipts?

A. The warehouse receipts are considered regular.

16 Q. Are those warehouse receipts the medium for transacting grain business on the produce exchange?

A. Yes, sir.

Mr. Dykman offers in evidence rule 5, section 1, of the rules of the grain trade established by the New York Produce Exchange, to the effect that no warehouse receipt can pass current on the floor unless the warehouse is licensed by the exchange.

He offers the charter of the produce exchange showing the right to make such by-laws.

Also all of the rules of the grain trade and the schedule of prices, being part of that, and a list of the stationary and floating warehouses.

They are all admitted.

Q. Has there been a meeting of the grain trade or of a committee of the grain trade with the warehouse and floating-elevator men or a committee of them since the passage of the bill?

A. Yes, sir.

Q. What was the result of that?

A. The result was that they revised the prices to get around this bill; they made the weighing and elevation five-eighths of a cent.

Q. And what other changes did they make?

A. $1.50 per thousand for trimming for canal boats.

Q. And $2.00 for trimming ocean vessels?

A. Yes, sir.

Q. And in the case of floating elevators was there a new charge made?

A. Yes, sir.

Q. A change never before made?

A. Yes, sir.

Q. And what was that for?

17 A. Transportation.

Q. And what was that?

A. One-half cent a bushel.

Q. Now, all the grain handled by the floating elevators, or substantially all of it—where does it come from?

A. From the canal and from the railroad.

Q. By canal and by railroad from where?

A. From Buffalo.

Q. From the Western States?

A. The canal comes from Buffalo and the railroad comes from all parts of the Western States.

Q. But the grain is grown and shipped from the West?

—. —.

Q. And where does the bulk of it go?

A. It goes to Europe.

Q. Where is the Olinda?

A. It is lying at Dow's stores.

Q. And where is she going?

A. I think she is going to Spain.
Q. Did you get a letter from Capt. Dupuy a short time ago?
A. I did.
Q. Who is Capt. Dupuy?
A. He is captain of one of the canal boats.
Q. Is he prominent in the canal-boat association?
A. Yes, sir.

The letter referred to and the envelope containing it are offered and received in evidence.

Q. (Handing paper to witness.) Is that an account of that meeting of that committee of the grain trade and the committee of the floating and stationary elevator men?
A. Yes, sir.

18 The paper referred to is offered in evidence, received, and marked Exhibit "No. 2, June 22, 1888."

Before Andrew Walsh, police justice, city-hall district.

THE PEOPLE OF THE STATE OF NEW YORK *against* FRANCIS E. PINTO. } June 22, 1888.

FRANCIS E. PINTO, called as a witness and sworn on his own behalf, testified as follows:

Examined by Mr. DYKMAN:

Q. What is your business?
A. Warehouseman.
Q. And your copartnership firm is what?
A. F. E. Pinto and Sons.
Q. And who are your copartners—what are the names of your sons?
A. Francis E., Jr., and William A.
Q. That is a copartnership firm?
A. Yes, sir.
Q. No corporation or company has any interest in your business?
A. None whatever.
Q. Where is your store?
A. Atlantic dock, Atlantic basin, Brooklyn.
Q. You are a lessee of the Pinto stores, are you?
A. Yes, sir.
Q. Your firm is?
19 A. Yes; a part of them, and some I own.
Q. You own some and lease some?
A. Yes.
Q. You or your firm?
A. The firm.
Q. How is the competition carried on by the warehouses on shore?

A. By giving a term of free storage, varying from 30 to 120 days.

Q. How is the competition carried on between the floating elevators?

A. By giving a cash rebate to the customer.

"EXHIBIT I."

No. —. BUFFALO, —— —, 188–.

Shipped by —— ——, as agent, in apparent good order, on board the canal boat ——, of ——, whereof —— —— is master, the following-described property, to be transported to the place of destination without unnecessary delay and to be delivered as addressed in the margin, in like good order, in the customary manner, free of lighterage, upon payment of freight and charges as prescribed in this bill; consignees to pay all harbor towing from and to the usual place of landing; three week days, regardless of weather (including day of arrival, providing notice of arrival shall be given before four o'clock p. m.), after arrival and notice of same to be allowed consignees to discharge this cargo, after which time the cargo or consignees are to pay demurrage at the rate of 2½ per cent. per day upon the freight, including tolls, for each and every day of such demurrage over the three days as above specified until the cargo is fully discharged; and it is agreed between the carriers and shippers and assigns that, in consideration especially of the rate of freight hereon named, the said carriers having supervised the weighing of said cargo in board, hereby agree that this bill of lading shall be conclusive as between shippers and assigns and carriers as to the quantity of cargo received in board and to be delivered at port of destination, and that they will deliver the full quantity hereon named; all damages caused by the boat or carrier or deficiency in the cargo from quantity as hereon specified to be paid for by the carrier and deducted from the freight, and any excess in the cargo to be paid for to the carrier by the consignees. In case the grain becomes heated while in transit the carrier shall deliver his entire cargo, and pay only for any deficiency caused by heating, exceeding five bushels for each one thousand bushels; and it is further agreed, in case this cargo is frozen while in transit, the owner of the boat is to pay interest and exchange on the advances and charges advanced by me on this cargo, the same to be deducted from balance of freight on delivery.

The freight, charges, and demurrage payable to —— ——, by check, to the order of the National Bank of Commerce, in New York, to the amount of $——, balance —— to order, at place of destination, who is agent for captain or owner and the only party authorized to collect the same, and whose receipt shall be in full of all demands on this cargo or bill of lading.

----Bushels---------- ----------
Freight to New York — cts. per bush----------
Advance charges------ ----------

Our advances to Capt.
21 Total
Less collection
Subject to our draft
On safe delivery pay captain balance
Care
Agents
New York
Insured in the

"Exhibit" No. 1, June 22, E. T. P.

EXHIBIT No. 2.

*Notice.*

A meeting of the members of the grain trade will be held in the call-room on Monday, June 18th, 1888, immediately after the grain call, to receive and act upon the following report of the special committee of grain receivers, exporters, and steamship agents in conference with the committee of elevator and warehouse men.

By order—

CHARLES C. BURKE,
*Vice-President.*

June 15, 1888.

*Report.*

NEW YORK, *June* 15, 1888.

To the members of the grain trade.

GENTLEMEN: The following proposition as to the charges on grain was considered and accepted by the joint committee of grain receivers, exporters, and steamship agents at a conference held
22 June 14th, 1888, with the elevator and warehouse men, and is recommended to the trade for adoption, viz:

*Charges—Grain Afloat.*

| | |
|---|---|
| Receiving, weighing, and discharging (⅝c.) per 1,000 | $6 25 |
| Canal-boat trimming per 1,000 | 1 50 |
| Trimming (ocean vessels) per 1,000 | 2 00 |
| Transportation of elevator (½c. per bushel) per 1,000 | 5 00 |
| Total charge (per 1,000) | $14 75 |

*Charges—Grain in Store.*

| | |
|---|---|
| Receiving, weighing, and discharging, including ten days' storage, (⅝c. per bu.) per 1,000 | 6 25 |
| Canal-boat trimming per 1,000 | 1 50 |
| Trimming (ocean vessels) per 1,000 | 2 00 |
| Extra storage (½c. per bushel) per 1,000 | 5 00 |
| Total charges (per 1,000) | $14 75 |

To carry into effect the above proposition the grain rules should be amended as follows:

Amend rule 26 of the grain rules by striking out the first sentence thereof and inserting the following:

"On all deliveries of grain, afloat or in store, buyers shall incur one-half of the customary expenses of receiving, weighing, and discharging ($\frac{5}{8}$c. per bushel). On all deliveries of grain from
23 store into ocean-bound vessels an extra charge of storage of one-half cent per bushel shall be incurred. On sales of grain afloat to be delivered into ocean-bound vessels buyers shall pay one-half cent per bushel transportation of elevator, which shall be collected by seller."

HENRY T. KNEELAND, *Chairman*,
DAVID BINGHAM,
F. W. J. HURST,
FRANKLIN QUINBY,
HENRY L. WARDWELL,
FREDERICK WEBER,
FRED. V. DARE,
} *Special Committee.*

EXHIBIT No. 2.

*Floating and Stationary Elevators at the Port of New York.*

Stationary.

| Name of owners or managers. | Names of elevators. | Location. | Storage capacity. | Transfer capacity per hour. |
|---|---|---|---|---|
| | | | *Bushels.* | |
| New York Central & Hudson R. R. elevator, Charles A. Pool & Co., lessees, 1 & 3 Beaver St. | N. Y. Central and H. R. R. R. | Foot 60th St., N. R., N. Y. city | 2,300,000 | 60,000 |
| Erie elevator, Annan & Hoyt, managers, 102 Produce Exchange. | Erie elevator | Jersey City, N. J. | 1,500,000 | 50,000 |
| Pennsylvania R. R. elevator, 8 Broadway | Pennsylvania R. R. | Jersey City, N. J. | 1,500,000 | 50,000 |
| The Grain Warehousing Co., Atlantic dock, Brooklyn; office 207 Produce Exchange, N. Y., R. H. Laimbeer, pres. and treas. | Stores Nos. 2 to 16, inclusive | Com'l wharf, Atlantic dock, B'klyn | 6,000,000 | 25,000 |
| | Stores Nos. 51 to 59, inclusive | " " " " " | | |
| | Stores Nos. 6 to 11, inclusive | Clinton " " " " | | |
| | Stores Nos. 70 to 92, inclusive | South pier " " " | | |
| E. Annan, 103 Produce Exchange | Columbia stores | Foot Atlantic St., Brooklyn | 1,500,000 | 8,000 |
| | Dows' stores | Foot Pacific St., Brooklyn | 2,500,000 | 24,000 |
| Trustees estate of Wm. Beard, 16 Beaver St. | Beard's | Erie basin, Brooklyn | 2,750,000 | 10,000 |
| F. Woodruff & Co., 202 Produce Exchange | F. Woodruff & Co.'s | Foot Joralemon St., Brooklyn | 1,500,000 | 8,000 |
| Nash, Whiton & Co. | Commercial stores | Com'l stores, Atlantic dock | 2,000,000 | 5,000 |
| F. E. Pinto & Sons, 459 Produce Exchange | Francis E. Pinto's | Atlantic dock, Brooklyn | 1,500,000 | 10,000 |
| U. S. Warehouse Co., J. E. Whilbey, sec'y, foot Degraw St., Brooklyn. | U. S. Warehouse Co. | Foot Degraw St. | 500,000 | 14,000 |
| E. B. Bartlett & Co., 19 Old Slip | Kelsey's stores | Foot Irving St., Brooklyn | 1,000,000 | 8,000 |
| | Central | 150 to 162 Furman St., Brooklyn | 1,000,000 | 16,000 |
| India Wharf Storage Co. | India wharf stores | 60 Hamilton Av., Brooklyn | 600,000 | 6,000 |
| S. W. Bowne | Bowne's stores | Gowanus canal " | 600,000 | 3,000 |
| S. W. Tripp & Co., foot W. 34th St. | Tripp's | Foot W. 34th St., N. Y. city | 300,000 | 4,000 |
| W. H. Payne, foot E. 129th St. | Payne's | " E. 129th St., " | 100,000 | 2,500 |
| E. M. Van Tassel, pier 39, N. R. | Van Tassel's | " of Vestry St., " | 30,000 | 2,500 |
| J. A. Beyer & Co., foot Taylor St., Brooklyn, E. D. | Beyer's | " Taylor St., Brooklyn, E. D. | 150,000 | 6,500 |
| Neidlinger, Schmidt & Co., foot E. 63d St. | Neidlinger, Schmidt & Co.'s | " E. 63d St., N. Y. city | 475,000 | 3,500 |

| | | | | |
|---|---|---|---|---|
| T. B. Tweddle, foot E. 48th St. | Tweddle's | " E. 48th St., " | 125,000 | 1,000 |
| Clark & Allen, foot E. 23d St. | Clark & Allen's | " E. 23d St., " | 30,000 | 2,000 |
| Shaw, Truesdell, 2d St. and Gowanus canal, Brooklyn. | Shaw & Truesdell's | 2d St. and Gowanus canal, B'klyn | 100,000 | 2,000 |
| | Floating. | | | |
| International Grain Elevating Association, Annan & Co., 101 Produce Exchange, N. Y. city. | Josie Mildred, 8,000 bushels | | | 8,000 |
| | N. Y. Republic, Ceres, Antwerp, each (2 hgs.) 8,000 bushels | | | 32,000 |
| | Bolivia, Reservator, Egypt, Fairfield, each 5,000 bushels | | | 20,000 |
| | Continental Eldredge, International, Manhattan, Metropolitan, Russia, Somerset, America, Excelsior, London, Malster, Croton, each 4,000 bushels | | | 48,000 |
| The N. Y. Floating Elevator Association, Geo. D. Puffer, agent, 319 Produce Exchange, New York. | Albany, Havre, Hudson, Liverpool, Oswego, each 5,000 bushels | | | 25,000 |
| Knapp & McCord, 94 Broad St. | Telegraph and J. L. Bower, each 4,000 bushels | | | 8,000 |
| Mongann & Bonnell, station, pier 6, North River. | Hillyer | | | 3,000 |
| Marsh, White & Co., foot Quay street, Brooklyn. | Manhattan | | | 5,000 |
| S. McConnell, 12 Bridge street | Geo. Albert | | | 3,500 |
| Totals | 22 stationary and 31 floating elevators | | 28,000,000 | 474,000 |

EXHIBIT 3.

Envelope postmarked Fultonville, N. Y., June 14, and directed to—

EDWARD ANNAN, Esq.,
N. Y. Produce Exchange,
New York city.

Letter:

Edward Annan, Esq., New York.

DEAR SIR: The first prescription prepared for the elevator owners by the Legislature is a sweet morsel compared with the dose in store for them. You, as leader of the elevator combination, would exhibit good sense by complying with the McEvoy bill.

Yours respectfully, CAPT. M. DEPUY.

Fultonville, June 14, '88.

24 *Warehouses.*

Rule 5.

SECTION 1. The board of managers may designate warehouses whose receipts shall be regular upon the written application of the owners or lessees (who must be members of the exchange), endorsed by not less than five members of the grain trade.

The application shall set forth the location and name of such warehouse, depth of water, capacity, quantity of grain that can be received and delivered per hour, number of elevators, and facilities for clearing grain.

The board of managers may reconsider and withdraw their approval of any designated warehouse for cause upon a summary proceeding before the board on a complaint of any person in writing, setting forth the particular violation of the rules of the grain trade, and upon satisfactory proof, to be taken in such manner as may be directed by the board of managers, and thereupon the receipts of such warehouse shall cease to be a valid delivery on contracts.

SEC. II. Regular warehouses shall embrace only those in which grain is stored in bulk, and in which the grain of different owners is mixed together, or in which grain is stored in such a manner that the identity of different lots or parcels is not accurately preserved, but two or more warehouses, contiguous, owned or operated by one individual or firm, in which graded grain is stored shall constitute what shall be known as a "system," and warehouse receipts designating the warehouses comprised in such system may
25 be issued without designating the particular warehouse in which the grain was delivered. Such warehouses shall be conveniently approachable by ocean vessels and shall have customary shipping facilities, including elevator, with proper cleaning apparatus.

It shall be the duty of the warehouseman, whose receipts are made regular, to allow the inspector-in-chief to inspect and grade all grain intended to be graded while going into store and on de-

livery from store; but the warehouseman, if not satisfied with the inspection, may refuse to receive the grain, and may, in all cases of dispute on the inspection, appeal to the committee on grain. Such grain may be stored with grain of a similar grade received at the same time as near as may be without regard to ownership. In no case shall grain (other than identical parcels) of different grades be mixed together while in store, nor shall warehouse receipts for the grain be issued upon parcels not originally inspected into store and merged in the grain.

SEC. III. Upon application of the owner or consignee of grain the warehouseman shall issue to the person entitled thereto a warehouse receipt therefor, subject to the order of the owner or consignee, which receipt shall bear date corresponding with the receipt of grain into store, and shall state upon its face the quantity and inspected grade of the grain, and that the grain mentioned in it has been received into store to be stored with grain of the same grade by inspection, and that it is deliverable upon return of the receipt properly endorsed by the person to whose order it was issued and the payment of charges for storage.

All warehouse receipts for graded grain which shall represent the grain as stored in a system of two or more warehouses shall not be deemed regular unless the following condition is incorporated in the receipt:

26 "In case of loss or damage by fire, so much of the said grain as shall bear a like proportion to this receipt as the lost or damaged grain of same grade shall bear to all grain of like grade in this system of warehouses at the date of said disaster shall be adjudged lost or damaged, and the obligation to deliver it under this receipt, except as salvage, cancelled."

All warehouse receipts for grain issued from the same warehouse shall be numbered consecutively, and no two receipts bearing the same number shall be issued by the same warehouse during any one year, except in the case of a lost or destroyed receipt, in which case the new receipt shall bear the same date and number as the original, and shall be plainly marked on its face "duplicate." If the grain was received from canal boat or other vessel, the name of such craft shall be stated upon the receipt, with the amount it contained.

SEC. IV. The following shall be the form of regular warehouse receipt for graded grain referred to in section 3:

Regular warehouse receipt for graded grain.

*Regular Warehouse Receipt for Graded Grain.*

No. ---------- ----------Kind of grain----------
Bushels ----------
Grade----------
----------(Date)----------188–.

Received in---- ---- ---- ------stores ----------
from ---------- ---- ----------
---------- ---------- ---------- ---------- ---------- bushels
of ---------- ---------- ---------- ---------- ----------subject
only to the order hereon of ---- ----------
and the surrender of this receipt and payment of charges.

27 It is hereby agreed by the holders of this receipt that the grain herein named may be stored with other grain of the same quality by inspection, in accordance with the rules and regulations of the New York Produce Exchange; loss by fire or heating at owner's risk.

SEC. V. Upon the delivery of grain from store upon any receipt such receipt shall be plainly marked across its face with the word "cancelled," and shall thereafter be void and shall not again be put in condition, nor shall grain be delivered twice upon the same receipt.

SEC. VI. No warehouse receipt shall be issued except upon the actual delivery of grain into store in the warehouse from which it purports to be issued and which is to be represented by the receipt, nor shall any receipt be issued for a greater quantity of grain than was contained in the lot or parcel stated to have been received, nor shall more than one receipt be issued for the same lot of grain except in cases where receipts for part of a lot are desired, and then the aggregate receipts for a particular lot shall cover that lot and no more.

In cases where a part of the grain represented by the receipt is delivered out of store and the remainder is left a new receipt may be issued for such remainder, but such new receipt shall bear the same date as the original and shall state on its face that it is balance of receipt of the original number, and the receipt upon which a part has been delivered shall be cancelled. In case it be desirable to divide one receipt into two or more or in case it be desirable to consolidate two or more receipts into one and the warehouse-
28 man consents thereto the original receipt or receipts shall be issued, expressing on the face that they are parts of other receipts or a consolidation of other receipts, as the case may be, and the numbers of the original receipts shall also appear on the new ones issued, as explanatory of the charge; but no consolidation of receipts of dates differing more than five days shall be permitted, and all new receipts issued for old ones cancelled, *are* herein provided, shall bear the same dates as those originally issued.

SEC. VII. The warehouseman may use his discretion to dispose of by delivery or shipping in the ordinary and legal manner of delivering that grain of any particular grade which was first received by him or which has been for the longest time in store in such warehouse, and, unless some portion of the grain in his warehouse is out of condition or becoming so, such warehouseman shall deliver grain of the grade that was received by him on all receipts as presented: Provided, that when the standard of grades is changed by the committee on grain all grain received prior to such change shall be delivered on the standard in force at the date of the warehouse receipt.

No warehouseman shall be held liable for damage to grain by heating unless it can be shown that he has not exercised proper care in handling and storing the same.

In case, however, any warehouseman shall discover that any portion of the grain in his warehouse is out of condition or becoming

so he shall immediately give notice to the inspector-in-chief of its actual condition, as near as he can ascertain it, and shall state in such notice the kind and the grade of the grain and the bins in which it is stored.

29 It shall be the duty of the inspector-in-chief, on receiving notice of graded grain in store being out of condition, — of such grain promptly, and if found to be out of condition he shall so report to the warehouseman, who shall cause the same to be posted immediately upon the bulletin of the produce exchange, and he shall also state in such notice the receipts upon which such grain will be delivered, giving the numbers, amounts, and dates of each, which receipts shall be those of the oldest dates and numbers, grain represented by which has not previously been declared or receipted for as out of condition; or if the grain in store has not been receipted for he shall so state, and shall give the name of the party for whom such grain was stored, the date it was received, and the amount of it, and the enumeration of receipts and identification of grain so discredited shall embrace, as near as may be, as great a quantity of grain as is contained in such bins; and such grain shall be delivered upon the return and cancellation of the receipts and the unreceipted grain upon the request of the owner or person in charge thereof, and thereafter the receipts so posted shall cease to be a valid delivery of graded grain under these rules between sellers and buyers.

Nothing herein contained shall be held to relieve the said warehouseman from exercising proper care and vigilance in preserving such grain after such publication of its condition, but such grain shall be kept separate and apart from all direct contact with other grain while in store in such warehouse.

In case the grain declared out of condition, as herein provided for, shall not be removed from store by the owner thereof
30 within two days from the date of the notice of its being out of condition, the warehouseman may charge an increased rate of storage on the same by giving public notice on the bulletin of the exchange.

In case of loss or damage by fire the warehouse receipts of the warehouses of elevator wherein the disaster occurs shall cease to be valid delivery of graded grain, under these rules, between sellers and buyers. But where the loss or damage sustained occurs to one or more warehouses comprised in a system, as described in sec. II of this rule, the warehouseman owning or operating such system of warehouses shall at once give public notice on the bulletin of the produce exchange of such fact, and shall also state in such notice the quantity of the various grades of graded grain which was contained in the warehouse or warehouses wherein the loss or damage by fire occurred.

The warehouseman shall also state in such notice the receipts outstanding upon such system of warehouses which are affected by such disaster, and shall call in said receipts for cancellation under the condition of section III of this rule governing cases of loss or damage by fire and for immediate reissue, as provided in section IV of

this rule, for the quantity of grain not injured, and the receipts so reissued, if properly registered, shall be a good tender, as provided in rule 6.

Nothing in this rule shall be so construed as to permit any warehouseman to deliver any grain stored in a special bin or by itself on any receipt or order for graded grain.

SEC. VIII. On return of any warehouse receipt, properly
31 endorsed, prior to 5 p. m. of any business day, and the tender of all charges upon the property represented by it, such property shall be promptly deliverable to the holder of such receipt, and it shall not be subject to any further charges for storage after demand for such delivery shall have been made, provided the vessel taking the same is ready at the stores at the time to receive it.

SECTION IX. Every warehouseman shall, on Monday morning of each week, cause to be made out and sent to the superintendent of the exchange a statement of the amount of each kind and grade of grain in store in his warehouse at the close of business on the previous Saturday, and shall also send a copy of the same to the registrar of the New York Produce Exchange. It shall also be the duty of the warehouseman to furnish daily to the same registrar a correct statement of the amount of each kind and grade of grain received in store in such warehouse on the previous day ending at 6 p. m.; also the amount of each kind and grade of grain delivered by such warehouseman during the previous day ending at 6 p. m., and what warehouse receipts have been issued and cancelled upon which the grain has been received or delivered on such day, giving the number of each receipt and the amount, kind, and grade of grain received and delivered upon each; also how much grain, if any, was so delivered, and the kind and grade for which warehouse receipt had not been issued and when and how such unreceipted grain was received by him, and the warehouseman making such statements shall, in addition, furnish the said registrar any further information regarding receipts issued or cancelled that may be necessary to enable
32 him to keep up a full and correct record of all receipts issued and cancelled and of grain received and delivered.

SEC. X. No warehouseman shall be permitted to mix any grain of different grades together other than identity preserved grain, or to select different qualities of the same grade for the purpose of storing or delivering the same, nor shall he attempt to deliver grain of one grade for another, or in any way tamper with grain while in his possession or custody with a view of securing profit to himself or any other person. Nothing in this rule, however, shall prevent any warehouseman from moving grain while within his warehouse for its preservation or safe keeping.

SEC. XI. All persons owning property or who may be interested in the same in any regular warehouse, upon proper application to the proprietor, and all duly authorized inspectors of such property shall at all times, during ordinary business hours, be at full liberty to examine any and all graded grain stored in any regular warehouse in this port, and all proper facilities shall be extended to such person by the warehouseman, his agents and servants, for an exam-

ination, and all parts of warehouses shall be free for his inspection and examination of such person or of any authorized inspector of such property.

SEC. XII. The president, subject to the approval of the board of managers, shall appoint a committee of three (3), consisting of one warehouseman, one exporter, and one receiver of grain, to whom shall be referred all disputed questions relating to the delivery of graded grain from warehouse, and the decision of such question by the committee shall be final.

33 The committee shall keep a record of their proceedings, and shall receive a fee of fifteen ($15) dollars for each case heard by them, which fee shall be paid by the party adjudged to be in fault, unless otherwise ordered by the committee.

Vacancies in committee may be filled in the same manner as provided in rule 1 for filling vacancies in the committee on grain.

Defendant rests.

It appearing to me by the within information and testimony that the crime therein charged has been committed, and that there is sufficient cause to believe the said Francis E. Pinto to be guilty thereof, I hereby order that he be held to answer the same before the undersigned, sitting as a court of special sessions in the city of Brooklyn, and that he be admitted to bail in the sum of $200 on said charge.

The said defendant, having failed to give bail as aforesaid, was by me committed to the sheriff of Kings county until he gives such bail.

ANDREW WALSH,
*Police Justice.*

"B."

*Commitment.*

STATE OF NEW YORK, } ss:
*County of Kings,* }

The sheriff of the county of Kings is required to receive and detain Francis E. Pinto, who stands charged before me for the

34 offence of violating chapter 581 of the laws of 1888 of the State of New York, to answer the charge before a court of special sessions in the city of Brooklyn.

Dated at the city of Brooklyn this 22d of June, 1888.

ANDREW WALSH,
*Police Justice of the City of Brooklyn.*

At a general term of the supreme court of the State of New York, second department, held at the county court-house, in the city of Brooklyn and county of Kings, N. Y., on the first day of October, 1888.

Present: Hon. Joseph F. Barnard, presiding justice.
" Calvin E. Pratt, "
" C. F. Brown, "

In the Matter of the Application of FRANCIS E. PINTO for Writs of *Habeas Corpus* and Certiorari.

The relator, Francis E. Pinto, having been duly arrested on or about the 22d day of June, 1888, for the offence of violating chapter 581 of the laws of 1888 of the State of New York, and writs of *habeas corpus* and certiorari having been duly granted by this court
35 on the 22d day of June, 1888, upon application of the said relator, returnable before the general term of this court in the first instance, now, on reading and filing the said writs of *habeas corpus* and certiorari and the returns thereto, and after hearing Messrs. Bergen & Dykman, counsel for relator, Francis E. Pinto, in behalf of said writs, and Messrs. Hyland & Zabriskie, of counsel for the people, etc., in opposition thereto, and due deliberation having been had thereon, it is—

Ordered that said writs be, and the same are hereby, in all things dismissed, without costs, and the prisoner is hereby remanded to the custody of the sheriff of the county of Kings, N. Y.

Enter.

C. E. P.,
*J. S. C.*

SIRS: Please take notice that the within is a true copy of an order in above-entitled action this day duly filed and entered in the office of the clerk of the above-named court in the county court-house, in the city of Brooklyn, New York.

Dated New York city, October 12th, 1888.

Yours, etc., HYLAND & ZABRISKIE,
*Of Counsel for the People.*

Office and P. O. address, No. 45 Broadway, New York city.

36 Supreme Court, General Term, Second Department.

In the Matter of the Application of FRANCIS E. PINTO for a Writ of *Habeas Corpus* and a Writ of Certiorari to Inquire into the Cause of His Imprisonment.

Take notice that Francis E. Pinto appeals to the court of appeals of the State of New York from the order of the general term of the supreme court made and entered herein in the office of the clerk of the county of Kings on the 12th day of October, 1888, dismissing the writs of certiorari and *habeas corpus* herein, and from each and every part of this order.

BERGEN & DYKMAN,
*Attorneys for F. E. Pinto, App'l't,*
189 *Montague Street, Brooklyn.*

To Hyland & Zabriskie, Esqs., attorneys for people and Canal Boat Owners' Association.

Hon. James W. Ridgway, district attorney of Kings county.

John M. Ranken, Esq., clerk of county of Kings.

37 Supreme Court.

In the Matter of the Application of EDWARD ANNAN.

In the Matter of the Application of F. E. PINTO.

BROWN, *J.*:

The defendants were arrested for violation of ch. 581 of laws of 1888, the first section of which reads as follows:

"SECTION 1. The maximum charge for elevating, receiving, weighing, and discharging grain by means of floating and stationary elevators and warehouses in this State shall not exceed the following rates, namely: For elevating, receiving, weighing, and discharging grain, five-eighths of one cent a bushel. In the process of handling grain by means of floating and stationary elevators the lake vessels or propellers, the ocean vessels or steamships, and canal boats shall only be required to pay the actual cost of trimming or shoveling to the leg of the elevator when unloading and trimming cargo when loading."

38 The defendant Annan was part owner and one of the agents for a floating elevator engaged in business in and about the harbor of New York, and the defendant Pinto is one of the firm of F. B. Pinto & Sons, engaged in business as warehousemen in the city of Brooklyn.

The complaint against the defendants is that on 21st day of June last they each charged the complainants for elevating, receiving, weighing, and discharging grain more than five-eighths of one cent a bushel.

Upon an examination held before a magistrate the defendants were committed to jail in default of bail pending their trial and have instituted these proceedings for the purpose of procuring their discharge upon the ground that the act of the Legislature aforesaid under which they were arrested violates that provision of the State constitution which provides that no person shall be deprived of life, liberty, or property without due process of law.

So much has been written within the last few years upon this constitutional safeguard and the meaning of the terms quoted has been so fully discussed in recent cases in both State and Federal courts that it would be superfluous for me to attempt to add anything to what the courts have already said or to do more than refer to the conclusions that have been reached and apply them to the case under consideration. For a full discussion of the subject I refer to the following cases:

Live Stock Association *vs.* The Crescent City, 1 Abb. U. S. Rep., 398.
Slaughter House Cases, 16 Wallace, 36.
Munn *vs.* Illinois, 94 U. S., 113.
Bertholf *vs.* O'Reilly, 74 N. Y., 509.
Matter of Jacobs, 98 N. Y., 98.
People *vs.* Marx, 99 N. Y., 377.
39 People *vs.* Gilson, 16 State Rep., 185.
Mugler *vs.* Kansas, 123 U. S., 623.

While the general proposition is conceded that a person living under our Constitution has the right to adopt and follow such lawful business not injurious to the community as he chooses, yet this right is subject to the power inherent in the Legislature to regulate the use of all property and the conduct of all citizens toward each other when necessary for the public good.

This power is usually denominated the police power of the State. Its exact boundaries and limitations have never been judicially established by any general rule, and probably never will be. Each case as it arises must be determined upon its own facts. While it may be difficult in many cases to reconcile the conclusions of different courts upon similar facts, all agree upon a few general rules that must control in determining the validity of the law.

Courts are confined to the single question whether the act in question exceeds the utmost limits of legislative power. If it does not—if it can stand when brought to the test of the Constitution—the question of its validity is at an end, and the judicial department of the Government cannot refuse to recognize and enforce it. It may be opposed to our opinion of natural justice or its operation may appear to be inequitable towards a large class of citizens, but if it is a valid exercise of legislative power we cannot judicially condemn it.

It was said by Chief Justice Waite, in Munn *vs.* Illinois, "For us the question is one of power, not of expediency. If no state of circumstances can justify such a statute, then we may declare this one void, but if it could we must presume it did. Of the propriety of legislative interference within the scope of legislative power the Legislature is the exclusive judge. The controlling fact is the power to regulate at all. If that exists the right to establish the maximum of charges as one of the means of regulation is implied."

In People *vs.* Marx, Rapallo, J., states the question as follows: "Conceding that the only limits upon the legislative power of the State are those imposed by the State constitution and that of the United States, we are called upon to determine whether or not these limits are transgressed by an enactment of this description."

Judge Cooley, in his work on Constitutional Limitations, p. 222, says: "Whether a statute is constitutional or not is always a question of power. In any case in which the question is answered in the affirmative the courts are not at liberty to inquire into the proper exercise of the power. If evidence was required, it must be supposed that it was before the Legislature when the act was passed, and if any special finding was required to warrant the passage of the particular act it would seem that the passage of the act itself might be held equivalent to such finding."

We have, therefore, but a single question in the case, viz:

Has the Legislature the right to regulate the use of property of the character specified in the act in question at all?

This question must receive an affirmative answer. The power has been exercised as to various classes of property since the formation of the State, and the reports are full of decisions upholding the authority of the State to regulate the use and enjoyments of prop-

erty and the control of private business in many ways;
41 and, in the case of grain-elevating business, we have the case of Munn *vs.* Illinois as a distinct adjudication in favor of the validity of such a law as the one in question.

The citations I have made are a sufficient answer to the arguments of the learned counsel for the appellants that this case can be distinguished from the Munn case on the ground that the validity of the Illinois statute was placed on the fact that the Chicago warehousemen had a virtual monopoly of the elevator business, and that the facts here show that no monopoly could exist.

How can this court say that no monopoly exists or may not exist in some or all of the cities of this State named in the law if it be that the existence of a monopoly is the fact which justifies such legislation? We must assume that the Legislature had evidence before it which created the demand for legislative regulation, and we cannot review its decision upon that question. Certainly the evidence taken upon a prosecution for violation of the provisions of the law cannot justify the assertion that the facts surrounding the business did not create a demand for the law.

As was said by Chief Justice Waite in the Munn case, "If any state of circumstances would justify such a statute we must presume they exist."

I fail to see how we can give any effect to the evidence taken before the magistrate on the question of the law's constitutionality.

The act is not made applicable to persons who possess a virtual monopoly of the business of elevating grain, but to certain political divisions of the State, and within those divisions is applicable to every individual.

42 It cannot be a valid law as to Mr. Annan and an invalid one as to Mr. Pinto, and yet if the court is to determine in every case that arises under the law whether or not a monopoly exists we might reach different conclusions in different cases.

It would certainly be a strange system of practice, assuming the court could review the decision of the Legislature upon questions within the scope of legislative power, that it should do so without having before it the evidence on which the legislative decision was based.

But such is not the law.

In Bertholf *vs.* O'Reilly, 74 N. Y., the court of appeals asserted that there was no limitation upon legislative power, except the limits and restraints of the Constitution, and against the point so ably argued by the learned counsel for defendants, that the court will look into the evidence taken on the trial and see whether a proper case exists for legislative interference. The case of People *vs.* Cipperly, 101 N. Y., 634, the opinion of Learned, justice, 37 Hun., 324, is a direct authority.

In considering the question whether the Legislature could prohibit the sale of milk drawn from healthy cows which in its natural state falls below the standard fixed by the act that learned justice says:

"Is that to be a question for the jury? If so, the court must

charge a jury in each case that if they find milk below the standard to be unwholesome, then the statute is constitutional; if they find it wholesome, then the statute is unconstitutional. Evidently a constitutional question cannot be settled or rather unsettled in that way.

43 The constitutionality would vary with the varying judgment of juries."

This opinion was adopted as the opinion of the court of appeals. But I can see no distinction between the two cases.

The circumstances surrounding the business in this State are apparently the same as in the Chicago case.

The great grain-producing region of the West and Northwest, sending its grain by rail and water to Chicago and making that city one of the great markets of the world, created a demand for means to handle and store the grain, and these means were found in the elevators and warehouses.

Fourteen elevators and warehouses adapted to this business in the city of Chicago, the case states, were controlled by nine business firms, by whom the prices for elevating and storing grain were fixed and regulated.

In this case we know that all grain brought into the cities named in the act in question arrived in cars or boats; that, whether it be stored in warehouses or reshipped to other places, it demands stationary and floating elevators to handle it; that in the harbor of New York, the evidence informs us, at least five different business firms operate and control floating elevators, and that the charges are fixed by a committee of the produce exchange, of which body some or all of these firms are members.

It is apparent, therefore, that the opportunity for a virtual monopoly is the same in each case. The element necessary to create it in each case was combination, and whether these was or had been or might be such a combination as to justify the interference of

44 the Legislature to regulate the use of this class of property we must presume was a question upon which the Legislature had sufficient evidence.

At all events it is impossible for me to distinguish this case from the Illinois case. That statute is a precedent for legislation of this character, and the decision of the supreme court of that State and of the Supreme Court of the United States and the substantial approval it received from the court of appeals in Bertholf *vs.* O'Reilly are decisive of the constitutionality of the law.

The Slaughter-House cases (16 Wallace, 36; Mobile *vs.* Yerille, 3 Abb. U. S., 140, and Bertholf *vs.* O'Reilly, 74 N. Y., 509) are also distinct authorities in favor of the validity of laws of this character.

In the latter case it was sought to have declared invalid that part of the civil damage act which makes the owner of real estate liable for damage resulting from the sale of liquor upon his property upon the same ground that the law under consideration is now attacked, but the court of appeals held that it was a proper regulation of the use of property, and in the opinion cite the Slaughter-House case and the Munn case with approval, as furnishing examples of the

due exercise of the police power by the State, and Judge Andrews, speaking of and quoting from them, says that "they illustrate the scope of the police power in legislation."

There is nothing in the more recent decisions of our court of appeals to which we have been referred that is in conflict with the authorities I have cited.

In People *vs.* Gilson the court held that chapter 691, Laws of 1887, was in no aspect valid as a health law, nor was it a regulation of the use of property or of trade in food.

45 Chapter 202, Laws of 1884, section 4, which was declared invalid in People *vs.* Marx, absolutely prohibited the manufacture or sale of an article of food — of any substitute for butter or cheese, however wholesome or however openly and fairly its character was avowed and published.

Such a law has nothing in common with the law in question.

The tenement-house cigar act (ch. 272, Laws of 1884), considered in matter of Jacobs, was declared invalid for the reason that it was apparent on the face of the law that it was not intended to protect health nor as a regulation of the use of property. Says Earl, J.: "It does not deal with tenement-houses as such; it does not regulate the number of persons who may live in any one of them or be crowded into one room; nor does it deal with the mode of construction for the purpose of securing the health and safety of their occupants or of the public generally. * * * It was not intended to protect the health of those engaged in cigar-making nor to protect the health of that portion of the public not residing in the forbidden tenement-houses, nor was it intended to improve or protect the health of the occupants of tenement-houses. It is plain that it is not a health law and that it has no relation whatever to the public health."

Such a law has clearly nothing to justify or support it, and was a plain invasion of the constitutional rights of the persons affected by it.

Laws which are intended to regulate the use of property in connection with the great products of the country, and especially with the necessaries of life, are plainly not to be classed with such laws as were considered in the cases just cited.

46 The sale of the property may not be prohibited when it is not unlawful nor injurious to the public and when its character is frankly avowed.

Nor can lawful employment be prohibited when its prosecution is not injurious to those engaged in it nor to the general public, without violating the safeguards of the Constitution. But property used in handling and storing the great staple articles of food and the necessaries of life, by which use a tax or toll is levied thereon, ceases while applied to such use to *juris privati* only and becomes affected with a public interest, and such use may be regulated by the Legislature without encroaching upon any of the constitutional rights of the owner.

I think the law in question valid, and the proceedings must there-

fore be dismissed, and the defendants remanded to the custody of the sheriff.

47 At a special term of the supreme court held in and for the county of Kings, at the court-house, in the city of Brooklyn, on the 27th day of November, 1889.

Present: Hon. Willard Bartlett, justice.

THE PEOPLE *ex Rel.* FRANCIS E. PINTO, Appellant,
*against*
ANDREW WALSH, Police Justice of the City of Brooklyn, Respondent.

THE PEOPLE *ex Rel.* FRANCIS E. PINTO, Appellant,
*against*
CLARK D. RHINEHART, Sheriff of the County of Kings, Respondent.

The above-named appellant having appealed to the court of appeals from the order of the general term of this court made and entered herein in the office of the clerk of the county of Kings on the 12th day of October, 1888, and said court of appeals having affirmed said order—

Now, on reading and filing the remittitur from the said
48 court of appeals and on motion of Bergen & Dykman, attorneys for the appellant—

It is ordered that the judgment of the court of appeals affirming said order be, and the same hereby is, made the judgment of this court, and that the aforesaid order entered herein on the 12th day of October, 1888, be, and the same is hereby, affirmed, and that judgment of this court be entered herein affirming said judgment.

Enter.

WILLARD BARTLETT, *J. S. C.*

Granted Nov. 27, 1889.
WM. J. KAISER, *Cl'k.*

49 [Endorsed:] Supreme court, Kings county. The People *ex rel.* Francis E. Pinto, appellant, against Andrew Walsh, police justice of the city of Brooklyn, respondent. The People *ex rel.* Francis E. Pinto, appellant, against Clark D. Rhinehart, sheriff of the county of Kings, respondent. Copy order. On remittitur from court of appeals. Bergen & Dykman, attorneys for appellant, 189 Montague street, Brooklyn, N. Y. To —— ——, Esq., attorney for —.

[Endorsed:] Service of a copy of within order and notice of entry of the same is hereby admitted. Dated November 29th, 1889. Hyland & Zabriskie, counsel for respondent.

50 Supreme Court, Kings County.

THE PEOPLE *ex Rel.* FRANCIS E. PINTO, Appellent,
*against*
ANDREW WALSH, Justice of the City of Brooklyn, Respondent.

THE PEOPLE *ex Rel.* FRANCIS E. PINTO, Appellent,
*against*
CLARK D. RHINEHART, Sheriff of the County of Kings, Respondent.

Judgment, November 27th, 1889.

The above-named appellent having appealed to the court of appeals from the order of the general term of this court heretofore entered herein, on the 12th day of October, 1888, and the said court of appeals having heard the said appeal and ordered and adjudged that the said order so appealed from be affirmed, and the remittitur
51 from the said court of appeals having been duly filed in this court, and an order duly entered thereon making the judgment of the court of appeals the judgment of this court and directing judgment to be entered herein, now, upon motion of Bergen & Dykman, attorneys for appellent, it is adjudged that the order hereinbefore mentioned, entered herein on the 12th day of October, 1888, be, and the same is hereby, affirmed.

WM. J. KAISER, *Clerk.*

52 [Endorsed:] 40–464. Supreme court, Kings county. The People *ex rel.* Francis E. Pinto, appellent, against Andrew Walsh, police justice of the city of Brooklyn, respondent. The People *ex rel.* Francis E. Pinto, appellent, against Clark D. Rhinehart, sheriff of the county of Kings, respondent. Judgment on remittitur from c't of appeals. Bergen & Dykman, attorneys for appellent, 189 Montague street, Brooklyn, N. Y. Filed Nov. 27, 1889.

53 In the Supreme Court of the United States.

THE PEOPLE *ex Rel.* FRANCIS E. PINTO
*against*
ANDREW WALSH, Police Justice of the City of Brooklyn.

THE PEOPLE *ex Rel.* FRANCIS E. PINTO
*against*
CLARK D. RHINEHART, Sheriff of the County of Kings, State of New York.

STATE OF NEW YORK, *County of Kings,* } *ss:*

Henry W. Slocum, Jr., being duly sworn, says: I am an attorney and counsellor-at-law of the State of New York, residing in the city of New York, practicing in the city of Brooklyn, and I am upwards of twenty-one years.

On December 9, 1889, I filed the original writ of error issued out

of the Supreme Court of the United States in the actions above entitled with the county clerk of Kings county, he being the clerk of the supreme court of the State of New York for the said county, and his office being the office wherein is filed the record of the proceedings in the court of appeals of the State of New York in the matters above entitled. At the same time I lodged a copy of
54 the said writ of error with the said county clerk of Kings county and filed with him the bond approved by Mr. Justice Blatchford.

On December 9, 1889, I served on the Hon. James W. Ridgway, district attorney for the county of Kings, State of New York, the citation in the above-entitled actions, by exhibiting to the said James W. Ridgway the original citation and leaving a copy of the same with him.

On the same day I served the said citation on Clark D. Rhinehart, sheriff of Kings county, by exhibiting to a clerk or deputy in the office of said sheriff the original citation and leaving a copy with him.

On the same day I served the said citation on John J. Walsh, police justice in the city of Brooklyn, successor to Andrew Walsh, one of the parties above named, by exhibiting to him the original citation and leaving a copy with him.

On December 10th, 1889, I served the said citation on Messrs. Hyland & Zabriskie, of counsel for the defendants in the actions above entitled, by exhibiting the original citation to them and leaving a copy with them, and on the same day I served on said Messrs. Hyland & Zabriskie the petition, the bond, and the writ of error in the actions above entitled by delivering to and leaving with the said Hyland & Zabriskie copies thereof.

H. W. SLOCUM, JR.

Sworn to before me this 15 day of January, 1890.

A. F. BRITTON,
*Notary Public, Kings Co.*

55 [Endorsed:] In the Supreme Court of the United States. The People *ex rel.* Francis E. Pinto against Andrew Walsh, police justice of the city of Brooklyn. Affidavit of service of citation, &c. Bergen & Dykman, attorneys for plaintiff, 189 Montague street, Brooklyn, N. Y. To —— ——, Esq., attorney for —.

Endorsed on cover: New York supreme court. No. 1105. The People of the State of New York *ex rel.* Francis E. Pinto, plaintiff in error, *vs.* Andrew Walsh, police justice of the city of Brooklyn, & Clark D. Rhinehart, sheriff of the county of Kings. Filed January 21, 1890.

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# Supreme Court of the United States.

**OCTOBER TERM, 1891.**

*No. 644.*

THE PEOPLE OF THE STATE OF NEW YORK EX REL. EDWARD ANNAN, PLAINTIFF IN ERROR.

*vs.*

ANDREW WALSH, POLICE JUSTICE OF THE CITY OF BROOKLYN, AND CLARK D. RHINEHART, SHERIFF OF THE COUNTY OF KINGS, DEFENDANTS IN ERROR.

*In Error to the Supreme Court of the State of New York.*

## BRIEF FOR PLAINTIFF IN ERROR.

BENJAMIN F. TRACY,
WILLIAM N. DYKMAN,
*Of Counsel.*

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.

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Endorsed on cover: New York supreme court. No. 1165. The People of the State of New York *ex rel.* Francis E. Pinto, plaintiff in error, *vs.* Andrew Walsh, police justice of the city of Brooklyn, & Clark D. Rhinehart, sheriff of the county of Kings. Filed January 21, 1890.

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# Supreme Court of the United States.

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*vs.*

ANDREW WALSH, POLICE JUSTICE OF THE CITY OF BROOKLYN, AND CLARK D. RHINEHART, SHERIFF OF THE COUNTY OF KINGS, DEFENDANTS IN ERROR.

*In Error to the Supreme Court of the State of New York.*

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# Supreme Court of the United States.

**OCTOBER TERM, 1891.**

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*No. 644.*

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THE PEOPLE EX REL. EDWARD ANNAN, PLAINTIFF IN ERROR,

*against*

ANDREW WALSH, POLICE JUSTICE, ETC., DEFENDANT IN ERROR.
(CERTIORARI.)

THE PEOPLE EX REL. EDWARD ANNAN, PLAINTIFF IN ERROR,

*against*

CLARK D. RHINEHART, SHERIFF OF KINGS COUNTY, DEFENDANT IN ERROR.

(HABEAS CORPUS.)

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*Error to supreme court of New York to review judgment dismissing writs of certiorari and habeas corpus, to review and inquire into arrest and detention of plaintiff in error, under chapter* 581, *Laws of* 1888 *of New York.*

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## Brief for plaintiff in error.

The plaintiff in error owns $\frac{3}{48}$ interest in the floating elevator "Ceres," and is a member of the copartnership firm of Annan & Company, agents of this and other floating elevators. On June 21, 1888, Mr. Annan made a bargain with John R. Taylor to transfer the grain cargo of the canal-boat "A. B. Twombly" from the canal-boat to the ocean steamer "Olinda." Mr. Annan refused to do the

work at the rates prescribed by the statute here in question and exacted his customary rate.

On June 22d, 1888, an information was laid before a police justice in the city of Brooklyn, New York, that a crime had been committed by the plaintiff in error and a warrant for his arrest was issued. Record, p. 9.

The charge was that in violation of chapter 581 of the Laws of 1888 Mr. Annan exacted more than $\frac{5}{8}$ of one cent per bushel for elevating, weighing, receiving, and discharging grain, and from the owner of the canal-boat "A. B. Twombly" more for trimming—*i. e.*, shoveling cargo—than the actual cost, and that he had exacted from the owner of the ocean steamer "Olinda," for trimming her grain cargo, more than the actual cost of the labor. Record, p. 8.

Mr. Annan was held for trial and committed to the custody of the sheriff of Kings county. Record, p. 25.

Writs of certiorari and *habeas corpus* were issued to inquire into this arrest and detention, and in his petition therefor Mr. Annan alleged, and rested his defense upon the allegation, that this law of New York contravened the State and the Federal Constitution. Record, p. 4.

The supreme court dismissed the writs and affirmed the constitutionality of the law. Record, p. 27.

The court of appeals affirmed the orders of the supreme court, Judges Peckham and Gray dissenting. Record, p. 35, p. 52, p. 56.

People *vs.* Budd, 117 N. Y., 1.
People *ex rel.* Annan *vs.* Walsh, etc., 117 N. Y., 621.

No opinion in favor of the law was written in this case in the court of appeals (Record, page 34, page 55). The only opinion in this case was the dissenting opinion of Judge Peckham. There had been argued in the court of appeals some two weeks before this case was argued there the case of The People *vs.* Budd. That was the case of a stationary elevator connected with a warehouse situate at Buffalo. The differences between the Buffalo case and the New York case in respects deemed conclusive of the question at issue by Judge Andrews are very wide, and we shall present at large these differences hereafter.

The plaintiff in error contends that the judgment of the court of appeals should be reversed; that this law is unconstitutional and void, and that he, being imprisoned under it, should be liberated, because—

1. His business of handling grain by floating elevators is wholly private and not subject to regulation by law. Mr. Annan has received from the State no charter, no privilege, no immunity, but he stands before the law on a footing with the laborers he employs to shovel grain, and is no more subject to regulation than any other individual in the community.

2. But even if his business were subject to regulation of prices, were he on a footing with a railroad, this law must be condemned and he must be liberated under the decision of this court in the Minnesota railroad cases, because the law fixes an arbitrary rate and precludes all inquiry as to whether it is reasonable or not. This is a judicial question and must be settled in each case judicially, or, at least, the law must permit and provide for such a settlement.

3. Because the law forbids any charge against the canal or ocean carrier for services to them beyond the actual cost of the labor involved in trimming—*i. e.*, wages of longshoremen.

The law in question is as follows:

"An act to regulate the fees and charges for elevating, trimming, receiving, weighing, and discharging grain by means of floating and stationary elevators and warehouses in this State."

"Approved by the governor June 9, 1888."

"Passed, three-fifths being present."

"The people of the State of New York, represented in the Senate and Assembly, do enact as follows:

"SECTION 1. The maximum charge for elevating, receiving, weighing, and discharging grain by means of floating and stationary elevators and warehouses in this State shall not exceed the following rates, viz: For elevating, receiving, weighing, and discharging grain five-eighths of one cent a bushel. In the process of handling grain by means of floating and stationary elevators, the lake vessels or propellers, the ocean vessels or steamships, and canal-boats, shall only be required to pay the actual cost of trimming or shoveling to the leg of the elevator when unloading, and trimming cargo when loading.

"SEC. 2. Any person or persons violating the provisions of this act shall, upon conviction thereof, be adjudged guilty of a misdemeanor and be punished by a fine of not less than two hundred and fifty dollars and costs thereof.

"SEC. 3. Any person injured by the violation of the provisions of this act may sue for and recover any damages he may sustain against any person or persons violating said provisions.

"SEC. 4. This act shall not apply to any village, town, or city having less than one hundred and thirty thousand population.

"SEC. 5. This act shall take effect immediately."

In its examination of the constitutionality of this law the Court will necessarily have recourse to judicial notice as a source of information. The New York Court of Appeals took judicial notice of the contents of a "Report of the committee on foreign commerce of the Chamber of Commerce of the State of New York on the bill before the legislature regulating elevator charges. Adopted by the Chamber April 2, 1885," and the report is cited and relied upon by Judge Andrews in the opinion of the Court of Appeals in the Budd case. (Record, page 39.) The canal boatmen and the elevator owners appeared before this committee and stated their arguments for and against the bill, and the committee of the Chamber of Commerce made an exhaustive examination into the subject. It is an axiom of construction that the court will inquire the state of the old law and the mischief in it which was to be cured by the legislative act, and such an examination of the history of this law will show the truth of the statement made by the Chamber of Commerce of New York that "the bill has been introduced at the instance of the owners of boats running on the Erie canal, who appear as the principal, if not the only, defenders of the measure."

Chamber of Commerce Report, p. 3.

It was opposed by grain receivers, dealers, exporters, brokers, and ship-owners. (Report, p. 4.)

The canal boatmen prosecuted the bill that they might by law be exempted from the charge customarily made against them for elevating grain from the hold of the canal-boat to the string piece of the dock.

"The boatmen lay particular stress on the fact that by the custom established at our port they are compelled to pay $5 per 1,000 bushels as their portion of the elevator charges, and they claim that anything beyond the $1.50 that may be charged to them for shoveling the grain to the leg of the elevator, and which is included in the above charge, is an unjust extortion. This argument, your committee submit, is not valid."

Chamber of Commerce Report, p. 11.

In practice, the law has been accepted as forbidding any charge to the canal or ocean carriers except "the actual cost of outside labor," and all business in New York has been done on that basis. (Record, p. 16.) The law was construed by the Court of Appeals (People *vs.* Budd, 117 N. Y., p. 5; Record, p. 36). Judge Andrews' words are: "The words actual cost used in the statute were manifestly

intended to exclude any charge by the elevator beyond the sum specified for the use of its machinery in shoveling and the ordinary expenses of opearting it, and *to confine the charge to the actual cost of the outside labor* required for trimming and bringing the grain to the leg of the elevator."

Before this bill was passed the prices charged for the work were, for 1,000 bushels, as follows:

| | |
|---|---|
| Elevating, including trimming (payable by canal-boat) | $5 00 |
| Receiving, weighing, and discharging (payable by grain owner) | 5 00 |
| Trimming a ship's cargo (payable by ship-owner) | 7 00 |
| | $17 00 |

This schedule of prices ruled only in the absence of a special agreement between the parties. There was always competition carried on by means of cash rebates to customers.

Chamber of Commerce Report, page 12.
Mr. Annan's testimony, Record, page 12.
Mr. Pinto's testimony, Record, page 15.

The maximum charges fixed by the law in question are as follows:

| | |
|---|---|
| Trimming in canal-boat, actual cost of labor (payable by canal-boat owner) at present rate of wages | $1 50 |
| Elevating, weighing, receiving and discharging (payable by grain owner) five-eighths of a cent per bushel | 6 25 |
| Trimming ship's cargo (payable by ship-owner) at actual cost of labor, and this at present rate of longshoremen's wages is | 2 00 |
| | $9 75 |

and a comparison of these with the old schedule shows that the law increased the charge customarily made against the grain owner from $5 to $6.25 per 1,000 bushels, and reduced the charge against the canal carrier from $5 to $1.50, and reduced the charge against the ocean carrier from $7 to $2—the net result being a reduction of almost one-half.

The Chamber of Commerce of New York examined the charges and the profits of the elevators, and on this subject their report

states that at the old rates the net profits of the stationary elevators for the four years prior to 1885 did not equal simple interest on the actual cost of the property; and of the floating elevators that "the older of the two companies," operating five "floaters" for the same four years, paid but one dividend, amounting to six per cent., and that their stock was offered at one-half of what it was worth five years ago; that the larger of the companies operating floating elevators paid nine per cent., but did not insure any risk but fire, and that insurance of the risk of river navigation would reduce the dividend to six per cent. (Report, p. 10.)

Mr. Annan testified that for two years the floating elevators had been unable to earn a dividend because of competion. (Record, p. 12.)

We complain with especial feeling against that part of the law which forbids us to charge against the canal or ocean carrier more than the actual cost of labor necessary to do the trimming.

In New York the "trimming" in the canal-boat is shoveling the grain from one place to another, and it is done wholly by longshoremen with hand scoops or shovels, and trimming the ship's cargo is stowing it and securing it for the voyage. It will be better understood by a detailed account of the operation of receiving grain in New York.

The first view of a floating elevator, and we propose to present a photograph of one, will show the Court that it is primari ly a boat. Some are scows and have to be towed from place to place by steamtugs, but the majority are propellers.

When the plaintiff in error made his bargain with Mr. Taylor the floating elevator "Ceres" was at another part of the harbor of New York, and it was necessary for her to steam to the wharf where the ocean steamer "Olinda" was lying. This element seems to us to be of very great importance. It suggests at once the question, which must be answered, whether Mr. Taylor or another party interested in having a canal-boat's cargo transferred to an ocean vessel had at common law and before this act was passed any right to demand that Mr. Annan should bring his elevator with her crew from the place she then was either to the canal-boat or to the ocean steamer. It shows at once how impotent the argument is that floating elevators command any situation.

Their work calls them to every part of the harbor and bay of New York. It seldom happens that two steamships are to be loaded at the same place. The elevators are constantly moving from place

to place, seeking work and performing it. This part of the work of a floating elevator compels her to have among her crew a pilot, an engineer, a fireman, and at least two deck hands.

"In New York the floating elevator has to be moved all over the port, from one ocean steamer or vessel to another, each of them frequently requiring but a few hours' actual work. This necessarily involves expense for moving the elevator, more or less risk of river navigation, and great loss of time over and above that consumed in the actual operation of elevating. It is well known that the operations of shipping grain abroad almost always have to be done in great haste, and that prompt and careful action on the part of the elevators, the employment of intelligent and skilled labor, and a large proportion of costly night work are required in order to meet the wants of numerous ocean steamers that sail at an appointed hour and must be loaded within a given short time."

Chamber of Commerce Report, p. 8.

When the elevator arrives at the ship's wharf or anchorage she goes alongside the ship and makes fast, and the canal-boat is brought on the outside of the elevator and made fast to it. The "leg" of the elevator is then lowered into the hold of the canal-boat and the "spout" of the elevator is lowered into the ship's hold. The machinery of the elevator is then set in motion, and the grain is "elevated" out of the canal-boat and "discharged" into the ship, The elevator is comparable to a huge pump.

The grain is lifted in buckets fastened to an endless belt, which moves up and down in a long wooden tube called the "leg" of the elevator. This leg is lowered from the tower of the floating elevator so that its lower end enters the hold of the canal-boat in the midst of the grain. It buries its lower end in the grain, and since this is open the buckets at this point are submerged in the grain. When the belt moves and the buckets ascend each carries its fill of the grain, and at the top (in the elevator tower) empties into the hopper, where the grain is "*received.*" Very soon the buckets carry all the grain which first covered them and which gravitation brings to them, and they clear a space around them, and were it not for trimming the operation would cease.

The elevator owner hires a gang of longshoreman to shovel the grain from all parts of the hold of the canal-boat to the leg of the elevator, so that the buckets may always be covered with grain and always pick it up and elevate it. This is "trimming" in the canal-boat hold. This is one part of the work which the elevator owner

must, under the law, do at "*actual cost* of the labor." (117 N. Y. at p. 5.)

The bill of lading, which is the contract governing the canal carrier, always has and still does bind the carrier to deliver his cargo (Record, p. 15). He should pay, therefore, for lifting the cargo out of his boat.

"The custom of charging the canal-boats one-half cent per bushel as cost of trimming and part cost of elevating arose from the duty imposed upon every boat, canal or other, of delivering her cargo on the string-piece of a dock, which necessarily involves some elevation.

Chamber of Commerce Report, p. 11.

When the grain is lifted to the elevator tower one stage in the process is finished. The grain is "received." After the grain has been "received" it is "weighed" by the weighmaster and his assistants, and then is "discharged" through a spout into the ship.

The owner or shipper of the grain is charged for weighing and moving the grain to the ocean steamer, from where the canal carrier delivers it, and hence the old charge against him of $5 per thousand, increased by this law to $6.25.

In the ship's hold the cargo must be stowed as the carrier desires it—that is, it must be shoveled to the proper part of the hold and so arranged that it will stand an ocean voyage without shifting. This is "trimming" in the ship's hold, and here the same vice crops out in the law, for the elevator owner can charge only the "actual cost of outside labor" (117 N. Y., 5) and nothing for his own labor or profit.

An examination of the operation of elevating grain by means of floating elevators shows that it is almost entirely an employment of human labor, and makes it necessary for the advocate of its regulation by law to justify a statute of laborers. Longshoremen shovel the grain to the leg of the elevator. The weighmaster and his assistant receive, weigh, and discharge the grain, and in the ship's hold other longshoremen stow the cargo. To move the elevator from place to place requires a pilot, engineer, fireman, and deck hands. The cost of the labor involved is over twenty times greater than the cost of the property. Indeed, the disproportion is so great that without substantial error the act may be viewed as a regulation of the price of skilled labor.

Grain is carried to the port of New York by railroad and in canal-boats. The New York Central railroad, the Erie railroad, the Penn-

sylvania railroad, and others terminating in New York harbor have their own grain warehouses and stationary elevators connected with them, and in these railroad warehouses is received all the grain that the railroads carry to New York, and this is about half the grain coming to New York. After a longer or shorter period of storage in railroad warehouses grain is discharged into ocean vessels, which go to the railroad warehouses to be loaded, or it is discharged into canal-boats, which perform the work of lighters, and these are towed to various parts of the harbor, and the grain is there transferred into ocean steamers by floating or stationary elevators, or it is taken into private warehouses along the Brooklyn or New York or New Jersey shores.

This railroad grain furnishes all the work the floating elevators do during the six months of the year when the canal is closed by ice. During these six months there is of course no canal traffic, and all the grain that is received in New York comes by railroad. One or two of the railroads have no warehouses, and all the grain they bring is immediately lightered either to departing steamships or to private warehouses. The lightering is done in canal-boats, and the canal-boat owners contract to receive the grain at the railroads and to deliver it to the ocean vessels. All this railroad grain business is now done under the compulsion of the act in question. The bulk of the grain that comes to New York by canal-boat goes into warehouses. This grain the floating elevators cannot handle. They cannot compete for this business. The several warehouses and other stationary elevators compete among themselves for this business, but the floating elevators are not in the competition. The floating elevators are merely instruments to transfer grain from canal-boats to ocean vessels, and so far as grain coming by canal is concerned they can only transfer grain which is sold upon its arrival to be exported immediately. The stationary elevators are constant and successful rivals for this business. The stationary elevator is always on the water front. It has a capacity very much greater than any floating elevator, and can do the work very much faster. At page 18 of the Record is a table of the stationary and floating elevators, and in the last column is stated the transfer capacity per hour. It will be seen that several of the stationary elevators have capacity to transfer fifty thousand bushels an hour; that the average capacity of the stationary elevators is over thirty thousand bushels, while the largest floating elevator can only transfer eight thousand bushels per hour.

The bulk of the grain exported is carried in "tramp" steamers,

and these load in the stream or at the wharf, where they can get the most advantageous terms. A "tramp" steamer can go to any one of the twenty-two stationary elevators to receive its cargo, and it does go to one of them in every case unless a floating elevator offers terms equally advantageous.

Mr. Annan testified that the competition between the elevators, stationary and floating, was fierce and constant, and that for two years the floating elevators had not been able to make a dividend. (Record, page 12.)

On this subject the Chamber of Commerce Report states (p. 12):

"In New York there is no pooling, nor even any formal understanding, as to the maintenance of any fixed charges; but the existence of a regular uniform tariff of charges is a necessity that will enforce itself under all circumstances. Every dealer in grain and every shipper and ship-owner in making his contracts must know beforehand what charges he will have to pay, and he generally has no time for making a special bargain. The existence of such a tariff, however, does not exclude the possibility of grading the charges according to circumstances. Your committee understand that with the storage elevators here as well as in Chicago it is a frequent practice to allow a rebate on the regular charges, either for elevating or for storage, whenever the elevator owner thinks that by doing this he can gain sufficient other advantage. Even the floating elevators occasionally make such rebates, and it is difficult to see how such a practice can be avoided or why it should be declared improper. By doing this the elevator owners accommodate themselves as best they can to the varying exigencies of a fluctuating business, and there can be no doubt that these rebates inure to the benefit of our grain trade, and amount in reality to a reduction of the regular charges, though it is impossible to estimate the actual extent of such reduction."

And again (p. 14):

"Of the Chicago elevators it could with good reason be held that 'they stand in the gateway of commerce and take toll from all who pass,' since these elevators are all attached to certain railroads, and the grain received over any of them has no choice but to go into the particular elevator attached to the road. Here in New York there is no such compulsion, the receiver of grain can select whatever means of transfer he desires to employ; nor is there anything to prevent capitalists from building new elevators and accepting any compensation for their services that may be satisfactory to them."

It is evident from this statement of the business of the floating elevators that the inevitable lot of their owners is a never-ending competition. Most of the grain they cannot by any means handle,

and such of the business as is open to them they can only get by offering advantages superior to those of the stationary elevators. They cannot by any possibility stand in the gateway of commerce and levy a tax or toll, but like the least of those who are in the marts of commerce they must make their way by meeting or beating their rivals.

Before this law went into operation the maximum price to be exacted by the elevator owner was agreed upon between him and his customers. They are practically all members of the Produce Exchange and they have a committee called the grain committee, and it, with steamship men and elevator owners, agreed from time to time upon a schedule of maximum prices, and this schedule was put to vote of the dealers in grain on the Produce Exchange, and if adopted it became the maximum rate.

Mr. Annan's testimony, p. 12, 13.

The varying exigencies of trade were met by cash rebates.

Mr. Annan's testimony, p. 12.
Mr. Pinto's testimony, p. 15.
Chamber of Commerce Report, p. 12.

It is true that the canal-boatmen are not members of the Produce Exchange, but this does not affect the principle. The argument is whether there was such a virtual monopoly of this business that prices were dictated by the elevator owners and that grain receivers and shippers were remediless in their hands. The facts show that the receivers and shippers, being ten to one in the constituency that voted upon the reasonableness of proposed schedules of rates, themselves fixed the rates. All that we claim is that the maximum rates were fixed by agreement and were not imposed by a powerful body of elevator owners upon a weak and remediless body of grain owners and shippers. The canal-boatmen were in fact not in the least harmed by not voting upon the question of rates. They were represented by the real party in interest. The grain owner who hires the canal-boat pays the charge for elevating, etc. The compensation of a canal-boatman is fixed by his competition with the railroads and is not any certain sum.

The price paid to the canal-boatman includes elevating at established rates, and his profit is substantially independent of the charge for elevating made against him. When he gives a rate for carrying a cargo from Buffalo to New York he reckons what he will pay the elevator as he does what it will cost him to be towed through

the canal and down the Hudson. The grain owner who engages canal freight and thus pays or promises to pay the elevating charge against the canal-boat goes straightway to the elevator owner and asks a rebate from the total price for elevating, weighing, and discharging, and in most cases he gets it. "By doing this the elevator owners accommodate themselves as best they can to the varying exigencies of a fluctuating business, and there can be no doubt that these rebates inure to the benefit of our grain trade and amount in reality to a reduction of the regular charges." (Chamber of Commerce Report, p. 12.)

We maintain, therefore, that the canal and the boatmen are well represented in the Produce Exchange by the grain merchants, who pay alike the boatmen and the elevator owners, and their grievance is utterly unreal.

Counsel for the canal-boatman in the courts below fell into a singular error concerning the power of the Produce Exchange over elevators by confounding them with warehouses. These warehouses issue receipts to owners who store grain, and these receipts are, if the warehouse has complied with certain rules of the Produce Exchange, a good delivery in execution of contracts. Counsel for canal-boat owners argued from this that the Produce Exchange limited the number of elevators. The answers are that there is no limit to the number of warehouses, and that the rule of the exchange upon this subject relates solely to warehouses and does not in the least affect elevators. (Record, p. 20.)

But the exchange as a corporation takes no part in this matter, and no by-laws of the corporation affect in the slightest any price. The by-laws recognize the divisions of the members as those who trade in flour, in cheese, in lard, or in grain, and each trade is left free to regulate itself. The grain trade by mutual agreement with the elevator-men fix a maximum price for elevating, which rules, if no rebates are given.

## Point one.

Floating elevators in the port of New York are private. They are not affected with any public interest, and they are not subject to regulation of rates.

In former times, and not so long ago but that men yet active in the grain trade took part in the transaction, grain was moved from the canal-boat to the ocean vessel by hand. Longshoremen shoveled grain into buckets or bags, weighed the grain, carried it on

their backs into the ocean vessels, and stowed it. Later a horse and tackle lifted several bags at once, and later still a donkey-engine lifted the bags. At the present time human labor does all the work of trimming in the canal-boat and in the ocean vessel. Human labor receives and weighs the grain. The sole change is that steam-power lifts the buckets, and a boat carries the steam-engine and the scales and the longshoremen and the weighmaster from point to point in the harbor. At what point in the evolution of this trade did it become subject to legislative control of prices? Now, as of old, human labor predominates in the operation to such extent that this law is open to all the objections that would greet and overwhelm a law fixing arbitrarily a longshoreman's wages.

Mr. Annan ought to be as free from control as any stevedore loading cargoes by steam and longshoremen—as free as the longshoremen themselves.

The floating elevator is comparable to a threshing machine which is moved about the country from one farm to another by horse-power. It is a general practice for the farmers to rely upon the owner of this machine, who goes from place to place, from farm to farm, threshing the grain grown by his customers. This machine takes the grain in sheaves from the field and delivers it threshed, in bins, in the barn. In both there is the element of property, but in each case labor predominates. It seems impossible to us, on any principle of law, to distinguish the one machine from the other or the labor involved in the one from the other, and we submit it is necessary, if this law of New York is to be upheld, that principles be enunciated which would give any farmer the right to compel the owner of the threshing machine to go to his farm and work at rates fixed by the legislature.

The floating elevator is also comparable to the machinery by which the stevedores load cotton for export. Cotton is one of the great staples of this country, and it is greatly to the interest of the port of New York that as much cotton should be brought to New York and stored there for a time and thence exported as is possible. Cotton is loaded from the warehouse to the ship by a donkey-engine and the labor of longshoremen, substantially as grain is transferred. It cannot be possible that the rates which stevedores charge for loading cotton cargoes may be regulated, and yet their labor stands before the law, and their freedom of contract and liberty ought to be governed upon the same principles which control floating elevators. The Erie canal is the way along which

is carried to the Hudson river vast quantities of cheese for export and lumber for home consumption. May the legislature fix the price of unloading such cargoes in New York; and, if not, what is the distinction between them and grain cargoes?

We are helped in our study of Mr. Annan's status by decisions of the New York Court of Appeals fixing the status of his fellow-laborers in the grain trade.

In Fish *vs.* Clark (29 N. Y., 122) a canal-boat owner was held not to be a common carrier. The case arose over a cargo lost by the sinking of the boat, and plaintiffs asserted that the defendant canal-boat owner was liable absolutely and without proof of negligence, because, they said, he was a common carrier. The whole case turned on whether he was a public or a private carrier.

It is also settled in New York that the steamboat which tows the canal-boat is not a common carrier.

Alexander *vs.* Green, 3 Hill, 9.
Caton *vs.* Rumney, 13 Wend., 387.
Wells *vs.* Steam Nav. Co., 2 N. Y., 204.

The stationary elevators along the Brooklyn shore are wholly private.

Wetmore *vs.* Brooklyn, &c., Co., 42 N. Y., 384.
Woodruff *vs.* Havemeyer, 106 N. Y., 129.

Those were the cases of the wharves in front of the elevators, but the principle was distinctly enunciated that the riparian owners could exclude the public. The head-note in the Wetmore case states:

The title of the riparian owners to lands acquired by erecting and filling in wharves or bulkheads on the lands under water as far as the permanent water line, under the authority conferred by the legislature, is not held subject to any right of the public to use the same."

The *Wetmore* case was an action for wharfage, and the defendant set up a statute regulating rates at public wharves, and the court held it did not apply because this wharf is private.

Mr. Woodruff's warehouses and elevators are just next to his wharf, and not a hundred feet away from the water, and are devoted in part to grain and in part to general merchandise, and if the wharves built out into the stream are private *a fortiori* are the warehouses back of them. We put the case of a cargo of grain in a

canal-boat towed by a steamboat to Woodruff's water-front property, whence the grain after a term of storage is lightered in the same canal-boat or another canal-boat to a "tramp" steamer and elevated by Mr. Annan's "Ceres"—what, we would ask, is there about Mr. Annan or his boat or its machinery that should deprive him of the rights which every other person engaged in this transaction has?

The canal carrier and the steamboat that towed him and the warehouse in which the grain was stored and the canal-boat in which it was lightered to the steamship and this "tramp" are all private and unaffected with any public interest and free to make their own bargain, free from the interference of the State. What has the elevator done to be so singularly affected with the so-called "public interest"?

The elevator owner has always maintained his freedom of contract, and never has any one asserted the right to command his services. The very complaint of the canal carriers, when demanding this law, was that the elevator owners had always exacted their own prices, which showed that they have always maintained their right to work as they chose. We submit with very great confidence that they are, therefore, in the class with the private carrier, and that none of the rules governing public carriers are applicable to the floating elevators.

We have shown that there is no combination among the elevator owners and that there is no monopoly, legal or virtual, but, on the contrary, a constant and effective competition; and there remains only to examine the argument most seriously pressed in the court of appeals, namely, that the construction and maintenance of the Erie canal by the State of New York confers upon its legislature power to govern and control elevators in New York. It may be that the welfare of the Erie canal would be enhanced if the State could own the warehouses and elevators at its entrance from Lake Erie and possibly the elevators in the port of New York; but there is a provision in the constitution that private property shall not be taken for public purposes, except upon payment of just compensation, and we submit that taking or controlling private property for the good of the Erie canal is taking private property for a public purpose, and may be done only upon just compensation. If the welfare of the canal and of the canal owners requires warehouses, there is an honest and a dishonest method of obtaining control—a constitutional and an unconstitutional procedure. The honest and

constitutional method is by eminent domain, making compensation for property taken. The proposition that the State may take the property of a citizen and destroy his freedom of contract in order that its waterway and the carriers operating thereupon may have advantages in competition with railroads is an entire departure from constitutional form of government. We see no difference in principle between the right of the State to control the elevator and its right to prescribe by statute what compensation shall be paid to the owner of land needed to support the banks of the canal.

Judge Andrews in the Buffalo case states that the Buffalo elevators command the entrance to the canal, and that a lake vessel with a cargo of grain entering the port of Buffalo must go to one of the elevators in the combination.

Take now the same grain in a canal-boat arriving in the port of New York. The master has his choice of stationary elevators in Hoboken, Jersey City, New York, or Brooklyn, or he may employ a floating elevator. *He must choose where he will go.* There is no combination; all are in competition, offering rebates from rates which have been agreed on as maximum rates, but are cut freely to meet the exigencies of commerce.

It is not conceivable that all who handle merchandise brought to New York by rail shall be held to be *quasi* public, and subject to have prices limited for their services, because the merchandise has been carried over a way built by permission and under a charter granted by the State. The fact that the one is a way on land, maintained by a grantee or appointee of the sovereign, and the other a waterway, maintained by the sovereign, does not alter the principle under discussion. But even if the law were or can be limited to grain carried through the canal, it is certain that the canal does not impress with a public character those who are engaged in carrying merchandise through it.

Fish *vs.* Clark, 47 N. Y., 122.
Wells *vs.* Steam Nav. Co., 2 N. Y., 204.
Alexander *vs.* Green, 3 Hill, 9.

Much less will it change the character of business and property so remote from the canal as that which, in New York city, handles the merchandise carried through it.

An answer to all arguments drawn from the canal is that it furnishes only a part, and a relatively decreasing part, of the business of the floating elevators. The railroads are constantly lowering

prices for grain carriage, and now they compete successfully with the Erie canal.

Chamber of Commerce Report, p. 11.

Most of the grain carried to New York through the canal goes into warehouses, while much of that which arrives by rail is transferred to canal-boats, and in them is carried to various parts of the harbor and transferred to ocean vessels. From November to May the canal is closed, and the floating elevators do little else but a railroad business (*Ibid.*, p. 13). During the months when the canal is closed hundreds of canal-boats lighter grain from railroad and other warehouses to ships about to sail, and even in the summer season canal-boats are used to carry grain from point to point in the harbor. These have no connection with the canal, and yet the prices of elevating the grain which they lighter about the harbor is regulated by this law.

**Point two.**

This law cannot be defended upon the ground that the legislature may determine in an act what rates are equal and reasonable.

Upon the face of this act appears its true nature, intent, and aim. Experience had shown that grain was most easily and economically moved and handled where the bill of lading under which the canal carrier transports his cargo bound him to deliver his cargo out of his boat and to pay therefor, and where the owner delivered the cargo to the ocean carrier, who, in his turn, bore the expense of stowing the grain against the voyage.

Chamber of Commerce Report, p. 11.

But the canal-boatmen, conceiving this to be unjust, secured in this act a provision that they shall only pay for shoveling the grain to the leg of the elevator and for that only at the actual cost of labor; and it is enacted also that the ocean carrier shall only be required to pay the actual cost of the labor involved in stowing his cargo.

The custom of the trade compels the elevator owner to trim the grain in the canal-boat and to stow the ship's cargo. It is thus done better and cheaper.

"If by the somewhat indefinite language of the bill it is intended to limit the charge for trimming to the actual wages paid to the trimmers and to allow nothing to be charged for superintending

the work, it is difficult to see how any elevator company could undertake the work. The steamers would have to do the trimming themselves, probably at a cost exceeding the present charge, and with a less satisfactory result as to the quality of the work, which can be done well only when combined with elevating and under the same supervision. The trimming of grain, it may here be observed, requires skilled labor and is a somewhat dangerous operation." (Chamber of Commerce Report, p. 11.)

This Mr. Annan does for the ship and this is all he does for the ship, and for this he ought to be paid by the ship.

It is certain that the law was intended by the boatmen to exclude any charge against them except this "actual cost of outside labor."

"The boatmen lay particular stress on the fact that by the custom established at our port they are compelled to pay $5 per 1,000 bushels as their portion of the elevator charges, and they claim that anything beyond the $1.50 that may be charged to them for shoveling the grain to the leg of the elevator, and which is included in the above charge, is an unjust extortion." (Chamber of Commerce Report, p. 11.)

This $1.50 per thousand bushels is the wages paid to the longshoremen.

The law reads:

"In the process of handling grain by means of floating and stationary elevators the lake vessels or propellers, the ocean vessels or steamships and canal-boats, shall only be required to pay the actual cost of trimming." (Sec. 1.)

The court of appeals held in the *Budd* case that the law limits the charge for trimming to "the actual cost of the outside labor required for trimming and bringing the grain to the leg of the elevator." (Record, p. 36.)

The grain merchants and the elevator-men accepted this interpretation of the law, and under this interpretation all work has since been done. (Record, p. 16.)

It results that the elevator owner must hire men, superintend their labor and be responsible for its results, and *all without compensation*, for he can charge only what he pays out for labor.

If it be answered that the elevator owner finds his profit in the charge against the grain owner for elevating, weighing, receiving, and discharging, the reply is that the law is equally vicious if the

fact be true; indeed this defence of the law is more vicious than the terms thereof, for by what power can the State legislature ordain that the work done for the canal-boatmen or for the owner of the ocean vessel shall be charged for at cost of labor only and make it lawful for the grain owner to be charged an additional price to cover the loss of profit on trimming?

The law, therefore, cannot be defended as a determination what rates are equal and reasonable. It is a law prescribing the terms of the several contracts involved in moving grain. It enacts who shall pay. It provides how much each shall contribute. It compels the grain owner to pay for all the work done for him and for a part of the work done for the canal and ocean carrier.

## Point three.

This law is unconstitutional within the decision of this Court in the case of the Chicago, Milwaukee & St. Paul R. R. Co.

The statute in question is unconstitutional, even if it be conceded or determined that the "Ceres" is a common or public elevator, for that would at the very furthest do no more than lower the rights of an elevator owner to those of a railroad company or other common carrier.

> Chicago, Milwaukee & St. Paul R. R. Co. *vs.* Minnesota, 134 U. S. Rep., 467.

The law there in question created a railroad commission, gave it power to fix rates, and provided that its order establishing a rate should be enforced in the courts by writ of mandamus. A local board complained to the commissioners of the charge made by the railroad for hauling milk, and the company was cited before the commissioners and appeared. The decision was against the company, and a lower rate was fixed and promulgated by the commissioners. The company refused obedience, and the State applied for a mandamus, to which the company answered that the rate fixed by the commissioners was unreasonable. The Minnesota court held that the law made the rate fixed by the commission final and irrevocable, and that its reasonableness could not be inquired into by the courts.

This Court reversed the Minnesota court, and in the course of his judgment Mr. Justice Blatchford wrote as follows:

"Under section 8 of the statute, which the supreme court of Minnesota says is the only one which relates to the matter of the fixing

by the commission of general schedules of rates, and which section, it says, fully and exclusively provides for that subject and is complete in itself, all that the commission is required to do is, on the filing with it by the railroad company of copies of its schedules of charges, to 'find' that any part thereof is in any respect unequal or unreasonable, and then it is authorized and directed to compel the company to change the same and adopt such charge as the commission 'shall declare to be equal and reasonable,' and, to that end, it is required to inform the company in writing in what respect its charges are unequal and unreasonable. *No hearing is provided for, no summons or notice of the company before the commission has found what it is to find and declared what it is to declare, no opportunity provided for the company to introduce witnesses before the commission; in fact, nothing which has the semblance of due process of law;* and although, in the present case, it appears that, prior to the decision of the commission, the company appeared before it by its agent and the commission investigated the rates charged by the company for transporting milk, yet it does not appear what the character of the investigation was or how the result was arrived at.

"By the second section of the statute in question it is provided that all charges made by a common carrier for the transportation of passengers or property shall be equal and reasonable. Under this provision the carrier has a right to make equal and reasonable charges for such transportation. In the present case the return alleged that the rate of charge fixed by the commission was not equal or reasonable, and the Supreme Court held that the statute deprived the company of the right to show that judicially. The question of the reasonableness of a rate of charge for transportation by a railroad company involving as it does the element of reasonableness, both as regards the company and as regards the public, is eminently a question for judicial investigation, requiring due process of law for its determination. If the company is deprived of the power of charging reasonable rates for the use of its property, and such deprivation takes place in the absence of an investigation by judicial machinery, it is deprived of the lawful use of its property, and thus, in substance and effect, of the property itself, without due process of law and in violation of the Constitution of the United States; and in so far as it is thus deprived, while other persons are permitted to receive reasonable profits upon their invested capital, the company is deprived of the equal protection of the laws."

It is, therefore, now the settled doctrine of this Court, as we understand it, that a law exercising the function of the State to control the prices charged by railroad common carriers and others subject to the like regulation, in order that their charges may be reasonable, must provide judicial forms and judicial machinery for the determination of the question or at least must leave the question

open for an examination in the courts, and that an attempt to regulate rates without providing judicial machinery and depriving the constituted courts of jurisdiction is unconstitutional and void.

The judgment of Mr. Justice Blatchford thus concludes:

"The issuing of the peremptory writ of mandamus in this case was therefore unlawful, because in violation of the Constitution of the United States; and it is necessary that the relief administered in favor of the plaintiff in error should be a reversal of the judgment of the Supreme Court awarding that writ and an instruction for further proceedings by it not inconsistent with the opinion of this Court.

"In view of the opinion delivered by that court, it may be impossible for any further proceedings to be taken other than to dismiss the proceeding for a mandamus if the court should adhere to its opinion that, under the statute, it cannot investigate judicially the reasonableness of the rates fixed by the commission. Still the question will be open for review; and the judgment of this court is *that the judgment of the supreme court of Minnesota, entered May* 4, 1888, *awarding a peremptory writ of mandamus in this case be reversed and the case be remanded to that court with an instruction for further proceedings not inconsistent with the opinion of this court.*"

The alternative left to the Minnesota court by this judgment was to dismiss the mandamus, which would leave the railroad company free to make its own rates or to reverse its former judgment, and adjudge that it could in the mandamus proceeding investigate judicially the reasonableness of the rates advised by the commission, and then to proceed to make such a judicial investigation.

It follows that unless the law of New York permits a judicial investigation into the reasonableness of the rates fixed it also is in violation of the Constitution of the United States. Consider first the charge the law allows the elevator owner to make against the canal carrier for trimming the grain in the hold of the canal-boat and the charge allowed against the ocean carrier for trimming his grain cargo.

No issue can be joined whether the actual cost of the outside labor is a reasonable rate, for reasonable here means fair—fair to the carrier and fair to the elevator, and whether it is such to the elevator owner depends on whether there is in it for him a profit corresponding to his labor, property, risks, etc. But this law forbids all profit, and the letter and spirit of the act would be violated if any court should institute an inquiry concerning the fairness of this rate.

In People *vs.* Budd one allegation of the indictment was that defendant exacted more than the actual cost for shoveling the grain

to the leg of the elevator. The defendant had paid to the Shovelers' Union $4 per thousand bushels for doing the trimming, and received from the union $1.75 per thousand bushels for the use of defendant's steam shovel. The defendant exacted this $4 per thousand bushels for trimming, and in his defense insisted that this was the cost of the work. It is certainly true that this substantially put before the court the question whether the statutory rate was reviewable in the trial of an indictment. The court of appeals wrote as follows (117 N. Y., p. 5; Record, p. 36):

"It is now urged that, assuming the constitutionality of the act of 1888, the judgment should be reversed for the reason that no overcharge by the defendant for shoveling was proved, and also that the sum paid for shoveling was paid to the Shovelers' Union, the defendant only receiving thereout from the union the rent agreed for the use of the steam-shovel. There are two answers to this proposition. The words 'actual cost' used in the statute were manifestly intended to exclude any charge by the elevator beyond the sum specified for the use of machinery in shoveling and the ordinary expenses of operating it and to confine the charge to the actual cost of the outside labor required for trimming and bringing the grain to the leg of the elevator. The purpose of the act could be easily evaded and defeated if the elevator owners were permitted to separate the services and charge for the use of the steam-shovel any sum which might be agreed upon between themselves and the Shovelers' Union, and thereby, under color of charging for the use of the steam-shovel, exact of the carrier a sum for elevating beyond the rate fixed by the act."

The law prescribes that a violation of its command to charge no more than the rates named in it shall be a misdemeanor. No State or national tribunal can inquire whether the rates are reasonable without asserting a power to annul a legislative act for other than constitutional reasons.

Mr. Justice Miller, announcing his concurrence, states that the remedy against a statute like the New York law in question is a bill in chancery, alleging that the rates established by the legislature are unreasonable. With the greatest respect, we think the difficulties of such a course are unsurmountable. The relief is specified in two cases, viz: "A decree forbidding the corporation from exacting such fare as excessive, or establishing its right to collect the rates as being within the limits of a just compensation for the service rendered." But assume the carrier thinks the rates unreasonably low and desires relief.

Who is he to proceed against? What is the effect of a favorable

decree? A judgment that the rate is unreasonable would seem to repeal the law. We feel very certain that this is not a judicial function.

Judge Andrews, in the course of his judgment in the Budd case, wrote as follows (117 N. Y., p. 25; Record, p. 49):

"It is upon these various circumstances that the court is called upon to determine whether the legislature may interfere and regulate the charges of elevators. It is purely a question of legislative power. If the power to legislate exists the court has nothing to do with the policy or wisdom of interference in the particular case *or with the question of the adequacy or inadequacy of the compensation authorized.* This court," said Chase, Ch. J., in the license-tax case (5 Wall., 469), "can know nothing of public policy except from the constitution and the laws and the course of administration and decision. *It has no legislative powers. It cannot amend or modify any legislative act.* It cannot examine questions as expedient or inexpedient, as politic or impolitic. Considerations of that sort must be addressed to the legislature. Questions of policy there are concluded here."

We submit that the true rule is found in Cooley's Constitutional Limitations (p. 222):

"*Inquiry into Legislative Motives.*"

"From what examination has been given to this subject it appears that whether a statute is constitutional or not is always a question of power—*that is, a question whether the legislature in the particular case, in respect to the subject-matter of the act, the manner in which its object is to be accomplished, and the mode of enacting it has kept within the constitutional limits and observed the constitutional conditions.* In any case in which this question is answered in the affirmative the courts are not at liberty to inquire into the proper exercise of the power. *They must assume that legislative discretion has been properly exercised.* If evidence was required it must be supposed that it was before the legislature when the act was passed, and if any special finding was required to warrant the passage of the particular act it would seem that the passage of the act itself might be held equivalent to such finding."

The "subject-matter" raises the question whether floating elevators are within the legislative jurisdiction. "The manner in which its object is to be accomplished" means that a "subject-matter" may be concededly within the legislative jurisdiction and the law be void for a defect in methods of accomplishment. This Court, in the *Chicago, Milwaukee, and St. Paul* case, held the Minnesota law

unconstitutional and void for just such a defect, viz., an attempt to exclude the courts from jurisdiction over the question of reasonableness of rates, and this defect of method is, we contend, equally fatal to the New York law.

## Point four.

Of the judgment of this Court in the *Munn* case—
Munn *vs.* Illinois, 94 U. S., 113.

With very great respect we submit that the mediæval rules and instances were allowed too great influence in this judgment. When England was mainly a pastoral and agricultural country, with her trade and commerce in their infancy, all sorts of burdensome restrictions were imposed upon the individual by a paternal theory of government for the supposed benefit of trade. We quote from the dissenting opinion of Judge Peckham (117 N. Y., p. 44):

"The rule as to private individuals who happen to be common carriers or innkeepers, etc., was established in the earlier days of the law, and it was regarded by Lord Hale as most proper that individuals who followed such callings should be placed under State supervision and control. The habits, customs, and general intelligence of the people of those days were far different from those of to-day; and laws which might possibly be pardoned on account of ignorance, sparseness of population, difficulties of communication, and rural and unsettled habits of life can have no justification in our times."

"It must be constantly borne in mind that in those days the theory of a paternal government which was to watch over and protect the individual at every moment, to dictate the quality of his food and the character of his clothes, his hours of labor, the amount of his wages, his attendance upon church, and, generally, to care for him in his private life was almost at its height."

"The famous statute of the fifth of Elizabeth, chapter 4, concerning labor was in full force when Lord Hale wrote (Lecky's England in Eighteenth Century, vol. 6, p. 233). That statute assumed to regulate the existence and determine the number of the artisans in the whole country. It provided how long one should work as an apprentice; how many there should be in proportion to journeymen; where they should live; under what circumstances move to another neighborhood; how many hours they should labor, and for how long a time a journeyman should be employed, and, finally, it provided that wages should be assessed for the year by the justices of the peace, who were also directed to settle all disputes between masters and apprentices. By an act of the first of James I, chapter 6, the above act was extended by giving to the justices power

to fix the wages, not only of journeymen and apprentices, but of all kinds of laborers and workmen."

"During this time also there were statutes making it a felony to export wool from England, and the exporter of sheep, rams, or lambs was liable to imprisonment, the forfeiture of all his property, and to have his left hand cut off for the first offense, and for the second offense to be adjudged a felon and to suffer death accordingly. (See 8 Eliz., ch. 3; 13 and 14 Chas. 2, chap. 18.) Provisions were extant forbidding exportation of hides, raw or tanned leather, and many other things, and all for the supposed benefit of the kingdom or the various interests in whose favor the legislation was enacted (Smith's Wealth of Nations, by McCulloch, p. 292 *et seq*). Laws were then in force which regulated down to the minutest detail the manner of life, and the texture of the dress and the costliness thereof, and the variety of dishes upon the tables of the people. Special laws determined how much land of an estate should be plowed and how much left for pasture; how much was to surround a laborer's cottage; how many sheep should be supported upon a farm. (England in the Eighteenth Century, Lecky, vol. 6, p. 231 *et seq.*)

But even at these times and in the midst of this mediæval darkness the course of the judges was toward freedom.

"The common law: We ought not, however, to forget that in England, at least, the statute book contains but half the law. The unwritten and judge-made common law has always held a very different tone in matters of industry. The same judges who delighted themselves with the intricacies of the law of real estate held one simple rule about industry—that it should be free. * * * It seems likely that the extremely wise course of the judges was due in no small degree to natural reaction against the tyranny of the statute law, the greed of class legislators, and the illegal encroachments of the Crown. The judges were the only disinterested parties in power, and, however they might delight on other occasions to display their acumen in logical quibbles, they took, in trade questions, the interest of the whole community as their sole guide."

Jevon's State in Relation to Labor, p. 38.

In the latter part of the eighteenth century there was a very general awakening to the false theories which had permitted these impositions. In England Adam Smith's great work was followed by many repeals of vicious regulations and by an entire cessation of new restraints. In France the edict of Louis XVI liberated trade from corresponding restrictions. In America the Declaration of Independence contains this announcement:

"We hold these truths to be self-evident—that all men are created equal; that they are endowed by their Creator with certain inalien-

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"We hold these truths to be self-evident—that all men are created equal; that they are endowed by their Creator with certain inalien-

able rights; that among these are life, liberty, and pursuit of happiness; that to secure these rights governments are instituted among men, deriving their just powers from the consent of the governed."

In the case of Dauplin *vs.* Key, McArther & McKay's Reports, at page 217, Judge Cox, of the supreme court of the District of Columbia, after quoting the Declaration of Independence, well says:

"The right to liberty and the pursuit of happiness includes the right to enjoy and acquire property. These are the rights, then, fundamental, natural, and antedating all constitutions which this amendment (the fifth amendment to the Federal Constitution) was designed to protect. To deprive of these would be punishment, except when the property is taken in the exercise of the right of eminent domain."

The Massachusetts constitution of 1780 was drafted by John Adams and James Bowdoin. The preparation of the Bill of Rights was committed to John Adams alone. The first article of the first part, so prepared by Mr. Adams, is in these words:

"All men are born free and equal and have certain natural, essential, and unalienable rights, among which may be reckoned the right of enjoying and defending their lives and liabilities; that of acquiring, possessing, and protecting property—in fine, that of seeking and obtaining their safety and happiness."

That the essence of the right of property is in its use and in the power of alienation for use by others is obvious. Without these the right is illusionary and valueless. Chief Justice Marshall long since taught us that to tax the sale of property is to tax the property itself (Brown *vs.* Maryland, 12 Wheaton, 419). The same proposition was repeated in Wilton *vs.* Missouri, 91 U. S., 275, Mr. Justice Field reporting the opinion of the unanimous Court.

Upon this point the case of Wynehamer *vs.* People, 13 N. Y., 378, is instructive. Judge Comstock, pronouncing the opinion of the court of appeals of New York (Judges T. A. Johnson, Mitchell, and Wright dissenting), says, at page 396:

"Nor can I find any definition of property which does not include the power of disposition and sale, as well as the right of private use and enjoyment."

After reciting from Blackstone, Kent, and Bouvier "Law Dictionary" definition of property, which includes the power of disposition, transfer, and alienation as a necessary incident to the right, Judge Comstock adds:

"These definitions are in accordance with the general sense of mankind. Indeed, if any one can define property eliminated of the attributes, incapable of sale, and placed without the protection of law it were well that the attempt should be made."

In matter of Jacobs, 98 N. Y., 98, opinion, p. 106, Judge Earl wrote for the court of appeals:

"So, too, one may be deprived of his liberty and his constitutional rights thereto violated without the actual imprisonment or restraint of his person. Liberty, in its broad sense as understood in this country, means the right not only of freedom from actual servitude, imprisonment, or restraint, but the right of one to use his faculties in all lawful ways—to live and work where he will, to earn his livelihood in any lawful calling, and to pursue any lawful trade or avocation. All laws, therefore, which impair or trammel these rights, which limit one in his choice of a trade or profession, or confine him to work or live in a specified locality, or exclude him from his own house, or restrain his otherwise lawful movements (except as such laws may be passed in the exercise by the legislature or the police power, which will be noticed later) are infringements upon his fundamental rights of liberty, which are under constitutional protection."

"Such legislation may invade one class of rights to-day and another to-morrow, and if it can be sanctioned under the Constitution, while far removed in time, we will not be far away in practical statesmanship from those ages when governmental prefects supervised the building of the houses, the rearing of cattle, the sowing of seed and the reaping of grain, and governmental ordinances regulated the movements and labor of artisans, *the rate of wages, the price of food*, the diet and clothing of the people, and a large range of other affairs long since in all civilized lands regarded as outside of governmental functions."

"Such governmental interferences disturbed the normal adjustments of the social fabric, and usually deranged the delicate and complicated machinery of industry, and caused a score of ills while attempting the removal of one."

These citations and our whole commercial history show that our Constitution fix a great and wide gulf between the old and the new; between mediæval darkness which permitted every detail of one's life to be regulated and modern freedom of action. We do not think that the judgment in the *Munn* case estimated truly the condemnation of the old system, its separation from the new, and the consequent weakness of argument drawn from mediæval times.

Mr. Chief Justice Waite made the basis of his judgment the custom—

"In England from time immemorial and in this country from its first colonization to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, innkeepers, etc., and in so doing to fix a maximum of charge to be made for services rendered, accommodations furnished, and articles sold."

We very respectfully deny the custom or the right to regulate the price of bread.

Of the regulation of bakers Judge Cooley writes in a note to his review of the *Munn* case, Constitutional Limitations, p. 736, note 3:

"Regulating the weight of bread is common and necessary to prevent imposition, but regulating the price of bread we should suppose would now meet with such resistance anywhere as would require a distinct determination upon its constitutional rightfulness. How the baker can have the price of bread which he sells prescribed for him, and not the merchant or the day laborer, is not apparent. Indeed, to admit the power seems to render necessary the recognition of the principles that there is and can be no limit to legislative interference but such as legislative discretion from time to time may prescribe."

Mobile *vs.* Yuille, 3 Ala. N. S., 137, does not uphold an ordinance fixing *the price* of bread. (Opinion, p. 129.)

The report states the case as follows:

"This was a case agreed. The facts presented on the record are that the defendant in error is a baker in the city of Mobile; that a quantity of bread made by him for sale was condemned *for being of less weight* than required by the proclamation of the mayor, made according to the ordinance of the mayor and aldermen, and fined twenty dollars. From this judgment he appealed to *the county court, which reversed the judgment* of the recorder, from which the mayor and aldermen prosecute this writ of error."

*The judgment of the county court against the law was affirmed* on the ground that—

"The by-law in this case, not being a sum certain but for such sum not exceeding fifty dollars as the corporation court might think proper to impose as a fine, cannot be supported.

"We also incline to doubt the propriety of that portion of the by-law which forfeits such bread as is not of the weight required by the ordinance, and also that portion which requires twenty dollars to be paid by the baker as a license unless the latter can be supported under the taxing power of the corporation."

The right to regulate the price was not in question nor is it mentioned in the opinion. On the contrary, the opinion by the empha-

sis of italics points out on page 143 that only "the assize of bread" was in question.

Mills were regulated at first, and the toll which the miller might take was prescribed, because to grind grain was a franchise and might not be done without permission from the king or the lord of the manor.

15 Viner's Abridgment, 398.
Cooley's Constitutional Limitations (5th ed.), 736.
Hix *vs.* Gardner, 2 Pulst., 195.

There are instances in the legislation of New York of statutory control of the miller's toll for grinding grain, but in every case we have found the limitation of toll was part of a grant by the State to an individual of the right to dam the waters of an arm of the sea or a public navigable stream; or, in other words, was a condition of a grant of a franchise.

Laws 1813, vol. 2, pages 292–303.

Counsel for the State in the *Munn* case cited two cases in North Carolina upholding a conviction under a law regulating mill-tolls. An examination of the law discloses that it refers only to *public* mills, which it defines to be such as grind for toll; that it therefore would not affect mills which grind for cash, and that the law delegates to public mills the right of eminent domain.

Each such mill is a delegate of the right of eminent domain, and is therefore a State agent or officer armed with a branch of the prerogative. The reason for the grant is the public nature of the business, and a business which is not public in its nature cannot under the Constitution receive such a grant of power.

Matter Eureka Warehouse, etc., 96 N. Y., 42.

The argument of Mr. Cary in the Minnesota cases calls attention very sharply to private mills and demonstrates that they are not subject to control.

"Take the immense milling plants at Minneapolis. If it is a power of government to fix the price at which wheat shall be converted into flour it could be applied to these mills as well as to custom mills, and the State of Minnesota might authorize this railroad and warehouse commission to fix the prices at which it should be done the same as they have fixed the price for switching cars and carrying milk and other freight, and this action would have the same constitutional sanction as the act in question.

"It is true that under the present practice these millers usually

purchase their own grain for milling; but if it is the right of the farmers to have the legislature fix the price at which their grain shall be milled and it is a function of government for them to do so they might choose themselves to convert it into flour at the price fixed by the State, and the owners of these mills would be compelled so give their services and the use of their property at prices fixed by the legislature and the courts would have to compel the performance of the duty by mandamus."

Judge Waite instances the control of hackmen:

The hackmen have a *legal* monopoly. It is a trade which the law can prohibit and suppress, but which it licenses and controls instead.

The right to ply vehicles for hire from exclusive stands in the streets is not a natural right, but wholly acquired from the State, which of course has the right to prescribe terms to the privilege it creates.

Cooley's Constitutional Limitations (5th ed.), 736.

To have a ferry is a franchise, and the governmental control is based on the fact that the right to use a boat for ferriage must come by State grant, which prescribes the conditions of the use.

Sir Matthew Hale *De Portibus Maris*, quoted by Judge Waite, p. 126.

Penal Code of New York, section 416.

Mayor *vs.* Starin, 106 N. Y., 1.

Mills *vs.* County Commissioner, 4 Ill., 53, head-note.

"It is a principle of the common law that ferries are *publici juris* and can be granted by the sovereign power. Riparian possessors are not by virtue of such possession entitled to the ferry franchise."

To same effect,

Trustees, etc., *vs.* Tatman, 13 Ill., 27.

Private wharves are the rule and public wharves the exception, as we may prove by Judge Waite's quotation from Sir Matthew Hale's text, *De Portibus Maris* (Opinion, p. 127):

"2. A man, for his own private advantage, may in a port town set up a wharf or crane, and may take what rates he or his customers can agree for carriage, wharfage, housellage, pesage, for he doth no more than is lawful for any man to do, viz., make the most of his own.

"3. If the king or subject have a *public wharf, unto which all persons that come to that port must come* and unlade or lade their goods, * * * in that case there cannot be taken arbitrary and excessive duties for cranage, wharfage, pesage, etc., * * * for now the wharfage and crane and other conveniences are affected with a public interest, and they cease to be *juris privati* only."

The wharf must be public *and* have a monopoly.

An instance of a private wharf was presented in Dutton *vs.* Strong (1 Black, 23), where the wharf-owner cut the hawser of a vessel moored to his wharf. In an action of trespass there was a verdict and judgment for plaintiff. In this court judgment was reversed.

Mr. Justice Clifford (p. 32):

"Piers or landing places and even *wharves may be private or they may in their nature be public.* * * * The owner may have the right to the exclusive enjoyment of the structure and to exclude all other persons from its use, or he may be under obligation to concede to others the privilege of landing their goods or mooring their vessels there upon the payment of a reasonable compensation as wharfage; and whether they are the one or the other may depend in case of dispute upon several considerations involving the purpose for which they were built, the uses to which they have been applied, the place where located, and the nature and character of the structure."

In New York the Brooklyn wharves are private.

Wetmore *vs.* Brooklyn Gas Co., 42 N. Y., 384.
Woodruff *vs.* Havemeyer, 106 N. Y., 129.

In New York it is doubtful if warehouses may be public.

Matter Eureka B. W. & M. Co., 96 N. Y., 42.

That was an application to condemn lands for the use of a company chartered to construct basins and warehouses along the Brooklyn water front. A special act delegated to the company the right of eminent domain, and this was held to be unconstitutional, the court saying, per Rapallo, *J.*, (p. 48):

"We cannot regard such a project as a public purpose or use which justified the delegation to this company of the right of eminent domain. The enterprise is, in substance, a private one, and the pretense that it is for a public purpose is merely colorable and illusory. The taking of private property for private purposes cannot be authorized even by legislative act; and the fact that the use to which the property is intended to be put or the structure intended to be built thereon will tend incidentally to benefit the public by afford-

ing additional accommodations for business, commerce, or manufactures is not sufficient to bring the case within the operation of the right of eminent domain so long as the structures are to remain under private ownership and control and no right to their use or to direct their management is conferred upon the public.

"We have not deemed it necessary to discuss the question whether if the main purpose of the act were to authorize the construction of a basin and wharves, to the use of which the public would be entitled under regulations to be established by public authority, the use would be a public one, nor the further question whether the addition to such powers of the right to establish private warehouses, shops, mills, or factories, and to carry on the business of a docking, warehousing, and manufacturing company would so far deprive the corporate enterprise of the public character as to invalidate the delegation to the company of the right of eminent domain."

This is much more than a decision that in New York a warehouse may be private. It distinctly doubts whether a warehouse may be public. It is, moreover, a declaration that the legislative determination that a warehouse is public does not bind the courts. There is an instance in Judge Waite's opinion of a warehouse made public by an acceptance of an exclusive privilege granted by act of Parliament.

Allnutt *vs.* Inglis, 12 East., 527.

The facts of that case are thus stated by Mr. Chief Justice Waite:

"It appeared that the London Dock Company had built warehouses in which wines were taken in store at such rates of charge as the company and the owners might agree upon. Afterwards the company obtained authority, under the general warehousing act, to receive wines from importers before the duties upon the importation were paid; and the question was whether they could charge arbitrary rates for such storage or must be content with a reasonable compensation."

Here is plainly a public grant of a valuable and exclusive privilege. The opinion of Lord Ellenborough shows that this grant making this company an agent of the excise, giving to the public the right to demand its services, made its dock public or common. Lord Ellenborough wrote:

"*There is no doubt that the general principle is favored, both in law and justice, that every man may fix what price he pleases upon his own property or the use of it; but if for a particular purpose the public have a right to resort to his premises and make use of them and he have a monopoly in them for that purpose, if he will take the benefit of that monopoly*

*he must, as an equivalent, perform the duty attached to it on reasonable terms.* The question, then, is whether, circumstanced as this company is by the combination of the warehousing act with the act by which they were originally constituted and with the actually existing state of things in the port of London, whereby they alone have the warehousing of these wines, they be not, according to the doctrine of Lord Hale, obliged to limit themselves to a reasonable compensation for such warehousing, and, according to him, whenever the accident of time casts upon a party the benefit of having a legal monopoly of landing goods in a public port * * * he is confined to take reasonable compensation only for the use of his wharf."

This is no more than the statement of the familiar doctrine that when the law confers a franchise there is an implied burden and consideration of the grant, viz., that the grantee will exercise the franchise for the public.

Lodging-houses are private, and there is nothing in the law of inns contrary to our contention, for it is certain that not all inns are common or public.

Chitty, in his work on Contracts (p. 477), states as the rule "to charge an inn-keeper on the custom or common law of the realm it is necessary that the inn be a common inn."

And in Cayles' case (8 Coke, 63) it is said "it ought to be a *common inn* and *not intended where one merely lodges another upon request.* * * * The plaintiff must *declare* that the defendant keeps such a common inn."

In mediæval times common carriers and common farriers alike were bounden to practice their art on demand and show skill in it.

Holmes' Common Law :

"The duties of a common carrier, so far as the earlier evidence goes, were simply those of bailees in general, coupled with the liabilities generally attached to the exercise of a *public calling.* The word 'common' addressed itself only to the latter point, as has been shown above" (p. 188).

"But there was another way besides this by which the defendant could be charged with a duty and made liable in case, and which, although less familiar to lawyers, has a special bearing on the law of carriers in latter times. If damage had been done or occasioned by the act or omission of the defendant in pursuit of some of the more common callings, such as that of a farrier, it seems that the action could be maintained, without laying an assumpsit, on the allegation that he was a 'common' farrier. The latter principle was also wholly independent of bailment. It expressed the general obligation of those exercising a public or 'common' business to practice their art on demand and show skill in it. 'For,' as Fitz-

herbert says, 'it is the duty of every artificer to exercise his art rightly and truly, as he ought.'" (*Ibid.*, page 183.)

"It is more pertinent here to notice that his further qualification, *exercising a public calling, was part of a protective system which has passed away.* One adversely inclined might say that it was one of many signs that the law was administered in the interest of the upper classes. It has been shown above that *if a man was a common farrier* he could be charged for negligence without an assumpsit. The same judge who threw out that intimation established in another case that *he could be sued if he refused to shoe a horse on reasonable request.* Common carriers and common inn-keepers were liable in a like case, and Lord Holt stated the principle: 'If a man takes upon him a public employment he is bound to serve the public as far as the employment extends, and for refusal an action lies.' An attempt to apply this doctrine generally at the present day would be thought monstrous, but it formed part of a consistent scheme for holding those who followed useful callings up to the mark." (*Ibid.*, page 203.)

The statement that a common farrier, like a common carrier, was bound on request to exercise his trade and was liable to an action for a refusal appears in the opinion of Lord Chief Justice Jeffreys in Jackson *vs.* Rogers, 2 Show., 332.

The distinction between public and private carriers was known of old, for in Hutton *vs.* Osborne, B. R. M., 3 Geo. II, MSS., cited Selwyn's *Nisi Prius*, 401, it was held that where in an action against a carrier the plaintiff does not declare "on the general custom of the realm relating to carriers" "the defendant must be taken to be a private person."

The distinction is still preserved in the law.

Allen *vs.* Sackrider, 37 N. Y., 341.

Fish *vs.* Clark, 49 N. Y., 122.

In both these cases the defendants were held to be private carriers and not subject to the liabilities of a common or public carrier.

In a still later case the court of appeals in New York has still further emphasized the idea that a carrier may be private and not bounden to serve the public.

Matter of N. Y., L. & W. R. Co., 99 N. Y., 12.

That was a proceeding to acquire the lands of the Union Steamboat Company, which alleged in its defence "that the property sought to be taken is already so devoted to a public use as to protect it from condemnation."

This Court decided against the steamboat company, saying (p. 23):

"Its charter did not make it a common carrier or impose upon it public obligations. *If it became a common carrier or assumed obligations that sprang from its own voluntary action* and not from the will of the sovereign it might carry passengers or not, as it pleased."

There was always, then, in every case where a wharf or a warehouse or an inn or a carrier was alleged to be public or common a question of fact to be determined, viz: Had the individual done the acts or had his property the antecedents and concomitants which give the public rights to his services and the use of his property? We affirm that this right to have it established in court by evidence that the individual is in the public service is a property right and is guaranteed by the Constitution of the United States.

The judgment of Mr. Chief Justice Waite disposes of this element in the authorities by adjudging that it is a question for the legislature and presuming in favor of the law that the legislature has decided that all who are within the terms of the law were at its date in a common or public employment and fit subjects for regulation of prices. The Chief Justice wrote as follows:

"For our purposes we must assume that if a state of facts could exist that would justify such legislation it actually did exist when the statute now under consideration was passed. For us the question is one of power, not of expediency. If no state of circumstances could exist to justify such a statute, then we may declare this one void, because in excess of the legislative power of the State; but if it could we must presume it did. Of the propriety of legislative interference within the scope of legislative power the legislature is the exclusive judge."

The law of New York here in question attempts to regulate all elevators in cities of over 130,000 population, viz., New York, Brooklyn, and Buffalo. It in effect declares that all elevators in these cities are and shall be public elevators. We contend that no state of circumstances can exist to justify this statute, and, within the doctrine of the quotation, we ask that it be declared void. It is impossible to justify this law by the precedents relied upon in the *Munn* case. The elements of publicity are in almost every case wholly within individual control.

There has not been and there cannot be in New York any such situation as existed in Chicago. No man and no set of men in New York can fix a rate of toll and thus tax commerce. There

will always be in the port of New York a genuine competition. Our floating elevator is radically different from *Mr. Munn's* warehouse in itself and in its surroundings.

Though called elevators, the buildings in Chicago controlled by the law were in reality warehouses, and they were situate at the termini of railroads. *The railroads and warehouses were in combination. The warehouse owners had dedicated their property to railroad uses.*

In 1870 the constitution of Illinois was revised. The instrument declared all grain warehouses to be *public* warehouses, and directed the legislature to enact laws to protect the producers and shippers of grain against *the combination of railroads and warehouses.* It was also provided that all the railroads should make connections with all the public warehouses and deliver grain to the one selected by the consignor.

Article XIII, secs. 1, 5, and 7.

The law there in question was passed under this constitutional mandate.

The *Munn* case arose upon an information in the criminal court of Cook county, Illinois, against the plaintiffs in error for transacting business as public warehousemen without a license. The warehousemen admitted the facts, but defended on the ground that the statute was unconstitutional for attempting to fix the maximum rates of storage.

The law was defended by the attorney general of Illinois upon the ground that the warehouses in Chicago had become public or common. We quote the statement of his propositions in this behalf.

"The shipping of grain in bulk and receiving and handling the same in modern elevators, the constant and almost uniform practice of confusing in one mass the property of different owners, the issuing of negotiable warehouse receipts to be used in commercial transactions as the ordinary evidence of title to grain in store, and the combinations among warehousemen to prevent legitimate business competition are of quite recent development and are not within the scope or purview of the old authorities relating to the duties and liabilities of warehousemen and forwarding merchants.

"People *vs.* R. R. Co., 55 Ill., 112.

"The judicial reports of Illinois furnish ample evidence of the tendency of railroad companies and proprietors of grain elevators and warehouses to enter into combination to secure a monopoly of

the storage of grain and to compel shippers from the interior to consign their grain to such warehouses in Chicago for storage as may suit the purposes of the managers of the railways and warehouses.

"R. Co. *vs.* People, 56 Ill., 367.
"Vincent *vs.* R. R. Co., 49 Ill., 33.
"People *vs.* R. R. Co., 55 Ill., 95.

"It thus appears that a few persons, following the vocation of public warehousemen for the storage of grain in Chicago, occupied such a position that unless restrained by law they could impose such charges as they saw fit upon all the grain shipped to that market for sale, and the shippers had no alternative but to submit to their demand.

"Warehousemen for the storage of grain in the manner business is conducted at Chicago are engaged in a public employment as distinguished from ordinary business pursuits. In this regard they occupy a position similar to common carriers, who are held 'to exercise a sort of public office' and have public duties to perform.

"Nav. Co. *vs.* Bk., 6 How., 382.
"Sandford *vs.* R. R. Co., 24 Pa., 381.
"Coggs *vs.* Bernard, 2 Ld. Raym., 909.
"R. R. Co. *vs.* People, 56 Ill., 377.

"Like common carriers, they are required by law to receive grain from all persons and store the same upon equal terms and conditions.

"When the owners of grain warehouses open the same to the general use of the public and exercise the statutory right of confusing the grain of different owners in one indistinguishable mass, for which negotiable receipts are issued under the statute; when they take possession of the 'gateway of commerce' and place themselves in such position and pursue their vocation in such manner that the grain-dealers and producers have no option but to use their warehouses for the storage of grain, we respectfully submit that their warehouses may without impropriety be designated 'public,' and that the constitutional convention and General Assembly of Illinois were quite excusable for treating them as such, and had authority to make all necessary regulations respecting such public use.

"This general proposition is fairly deducible from the authorities.

"Whenever a person pursues a public calling and sustains such relations to the public that the people must of necessity deal with him and are under a moral duress to submit to his terms if he is unrestrained by law, then, in order to prevent extortion and an abuse of his position, the price he may charge for his services may be regulated by law."

Mr. Chief Justice Waite states thus the facts which could make public the Chicago warehouses:

"The grain warehouses or elevators in Chicago are immense structures, * * * located with the river harbor on one side

and the railway tracks on the other; and the grain is run through them from car to vessel, or boat to car, as may be demanded in the course of business."

"The railways have found it impracticable to own such elevators, and public policy forbids the transaction of such business by the carrier; the ownership has, therefore, been by private individuals, who have embarked their capital and devoted their industry to such business as a private pursuit."

"In this connection it must also be borne in mind that, although in 1874 there were in Chicago fourteen warehouses adapted to this particular business and owned by about thirty persons, nine business firms controlled them, and that the prices charged and received for storage were such 'as have been from year to year agreed upon and established by the different elevators or warehouses in the city of Chicago, and which rates have been annually published in one or more newspapers printed in said city, in the month of January in each year, as the established rates for the year then next ensuing such publication.' Thus it is apparent that all the elevating facilities through which these vast productions 'of seven or eight great States of the West' must pass on the way 'to four or five of the States on the seashore' *may* be a 'virtual monopoly.'"

"They stand, to use again the language of their counsel, in the very 'gateway of commerce' and take toll from all who pass. Their business most certainly 'tends to a common charge, and is become a thing of public interest and use.' Every bushel of grain for its passage 'pays a toll, which is common charge,' and therefore, according to Lord Hale, every such warehouseman 'ought to be under public regulation, viz., that he * * * take but reasonable toll.'"

There is nothing in these propositions advanced in support of the law antagonistic to our contention that *a floating elevator in the port of New York* is wholly private. No one of the elements is present in this case.

The following quotations from the prevailing opinion in the State court show that the connection of the warehouses with the railroads caused and was held to have justified the law:

Munn *vs.* People, 69 Ill., 80; opinion, p. 89.

"Independent of any constitutional provision they (the legislature) would have an undoubted right, knowing that a large proportion of our cereals to reach the markets of the world were *compelled to pass through certain warehouses*, called elevators, and subjected to such charges as their owners might see fit to impose, to take up this whole subject as one legitimately within their domain, and if in their examination of it *they find the owners and managers of these warehouses are an organized body of monopolists, possessing sufficient*

*strength in their combination and in their connection with railroads of the State to impose their own terms upon the producers and shippers of these cereals,* * * * can it be said to be an usurpation of power on the part of the legislature to bring them in subjection to law?"

And again, p. 90:

"It is idle to talk about the consent of their customers to higher rates of charges than this law allows them to receive. Their customers before this law was enacted had no protection against these monopolists."

That the railroad idea and connection was a controlling one is shown by judgments in later cases explaining the *Munn* case.

In the *Wabash railroad* case, 118 U. S. Supreme Court Reports, 557, Mr. Justice Miller wrote of the Granger cases:

"And the great question to be decided, and which was decided, and which was argued in all those cases, was the right of the State, within which a railroad company did business, to regulate or limit the amount of any of these traffic charges.

"The importance of that question overshadowed all others, and the case of *Munn* vs. *Illinois* was selected by the court as the most appropriate one in which to give its opinion on that subject, because that case presented the question of a private citizen or unincorporated partnership engaged in the warehousing business in Chicago, free from any claim of right or contract under an act of incorporation of any State whatever and free from the question of continuous transportation through several States; and in that case the court was presented with the question, which it decided, whether any one engaged in a public business in which all the public had a right to require his service could be regulated by acts of the legislature in the exercise of this public function and public duty, so far as to limit the amount of charges that should be made for such services."

Mr. Munn's warehouse was, it might well be argued, the railroad warehouse. He was under contract, express or implied, with the railroad company to receive and deliver all the grain it carried. The railroad company was under a common-law duty to do this for all persons indifferently without discrimination and at reasonable rates. If Mr. Munn assumed that duty, a producer or shipper or receiver of grain had a perfect and enforceable right at common law to go upon Mr. Munn's premises and have a contract made for the reception, storage, and delivery of his grain arriving or departing by railroad at reasonable rates. Mr. Munn had made his property a part of a railway system, the part by which it received and delivered grain at Chicago.

**Point five.**

This law is unconstitutional and void because it decides that Mr. Annan's elevator is not private, and therefore free from legislative control without due process of law.

The law in question governs and regulates all elevators in cities having one hundred and thirty thousand population, and the Supreme Court, construing the law, held that no evidence before the magistrate could be considered.

Judge Brown's opinion, Record, p. 29:

"We must assume that the legislature had evidence before it which created the demand for legislative regulation, and we cannot review its decision upon that question. Certainly the evidence taken upon a prosecution for violation of the provisions of the law cannot justify the assertion that the facts surrounding the business did not create a demand for the law."

"It cannot be a valid law as to Mr. Annan and an invalid one as to Mr. Pinto, and yet if the court is to determine in every case that arises under the law whether or not a monopoly exists, we might reach different conclusions in different cases."

In concluding his judgment Judge Andrews wrote (117 N. Y.; Record, p. 52):

"We are of opinion that the statute of 1888 is constitutional as a whole, *and that although it may comprehend cases which, standing alone, might not justify legislative interference, yet they must be governed by the general rule* enacted by the legislature."

We take issue at this point; we contend ours is a case comprehended by the statute, yet not justifying legislative interference, and we submit as the true rule that if one single case falls within the statute whose antecedents and concomitants do not justify legislative coercion the law is void.

The People *vs.* Marx, 99 N. Y., 377.

That law prohibited the manufacture and sale of any substitute for butter. The court of appeals held it to be unconstitutional because it embraced and prohibited wholesome substitutes. The court held the legislature could only suppress unwholesome substitutes, and that the excessive use of power vitiated the whole act.

Morgan *vs.* King, 35 N. Y., 454.

The legislature declared by law that the Racket river was public for driving logs, but riparian owners who challenged the constitutionality of the law were allowed to prove that the river was private, and as a consequence the act was declared unconstitutional.

In the *Jacobs* case (98 N. Y., 98) the New York rule is stated with great force and clearness.

That case was brought before courts exactly as this is, by writs of *habeas* and *certiorari*, to inquire as to the cause of the relator's detention. He had been arrested, taken before a police magistrate, and held for trial. Evidence was taken before the magistrate, of which Judge Earl writes (p. 103):

"The facts as they appeared before the police justice were as follows: * * * The relator at the time of his arrest was engaged in preparing tobacco and making cigars, but *there was no smell of tobacco in any part of the house except the room where he was thus engaged.*"

And again (p. 110):

"Under the mere guise of police regulations, personal right and private property cannot be arbitrarily invaded, *and the determination of the legislature is not final or exclusive.* * * * It matters not that the legislature may in the title to the act or in its body declare that it is intended for the improvement of the public health. *Such a declaration does not conclude the courts, and they must yet determine the facts declared, and enforce the supreme law.*"

And again (at p. 115):

"When a health law is challenged in the courts as unconstitutional on the ground that it arbitrarily interferes with personal liberty and private property without the due process of law, the courts must be able to see that it has at least in fact some relation to the public health, that the public health is the end actually aimed at, and that it is appropriate and adapted to that end. This we have not been able to see in this law, and we must, therefore, pronounce it unconstitutional and void."

In the case of the Eureka Basin, &c., Co. (96 N. Y., 42) the court of appeals reviewed a law which delegated the power of eminent domain to a Warehouse & Basin Company and decided that the company was not public.

We contend it is not to-day competent for the legislature to add to the number of trades which may be made common or public by the conduct of the individuals who engage in them. Assume that warehouses may be so made common and public, and that there is

an intimate relation between warehouses for grain and the neighboring and connected stationary elevator, and that the reason of the words of the exceptional rule governing warehouses would apply to floating elevators, so will the general rule which exempts from control those who load cotton or cheese or other of our products into ocean vessels and floating elevators will fit any statement of the rule which leaves free the traders who hire the elevators and buy and sell the grain crop of the country.

Either one of two rules must govern the legislature. They are either forbidden to extend the rule governing those who follow common or public trades beyond the few trades which constitutional guaranties have, in the course of history, recognized as exceptions to the general freedom, or else they may in a statute declaring the common law announce the facts which make a trade public and common and reduce the right of compensation to what a legislature or a court may think fair. If the legislature is forbidden to range at will this wide field they cannot make the slightest trespass, no matter how close the analogy between an undisputedly public trade and another which has remained private. A citizen of New York like Mr. Annan, who handled grain when human labor with bags and shovels and hand scales did the work, and when, later, horse-power and, later still, a small steam-engine on the dock lightened the longshoreman labor, and who invested his money and his whole business ability and experience in floating elevators when the demands of the business outgrew older methods' is not subject to have his trade added to the exceptional few under control. If this is the true rule, all floating elevators will remain private and not subject to control; but we will assume that the list of public trades may be added to from time to time, and the inquiry then concerns the provinces of the legislature and the judiciary.

It cannot be disputed by those who rely on the *Munn* judgment that the courts have some control of a legislative declaration that an elevator or class of elevators are public and common. Judge Waite wrote that the Chicago elevators could not be made public by the law, but had been so made by the facts; and, again, that if no state of facts could exist to justify the statute the court could declare it void. Under this we claim that the court may condemn this New York law, for no state of facts could make all the floating elevators in the port of New York permanently public, and that is what this law has attempted.

But we contend that the legislative function is less and the judicial control greater than the *Munn* judgment would establish.

We deny that the decision whether any elevator or group of elevators is private or public or whether a carrier is "common" or private or whether a given house is a boarding-house or an inn is a legislative question. Such questions are essentially judicial and require due process of law. Yet this law has decided that every elevator in New York, Brooklyn, and Buffalo is public and common. It has gone further than that, for it has ordained that there shall be no private elevators. Could a law ordain that every boarding-house should be subject to the law of inns, and that if you take one person to board you may not exclude any traveler? Could the legislature enact that if I from time to time carry freight in my truck for A or B or C I shall become a common carrier and bounden to work for all? Can the legislature say that all the brooks in the State are public highways, or that all the wharves in New York harbor are public?

A warehouseman about to enter business may locate and conduct himself so that he and his property will remain private. The same is true of a wharfinger.

Whether a carrier shall be public or private is for himself to choose; and so of an elevator owner. The plaintiff in error has received no franchise or privilege of any kind from the State, directly or indirectly; he has no connection, directly or indirectly, with any carriers or persons with franchises or privileges; he has no monopoly, legal or virtual; he is not in combination with others to restrain or affect competition; he has no advantage of location; he is subject at all times to competition and all the laws of trade; he has at all times worked for whom he pleased and when he thought advantageous to himself and at prices which he chose to agree upon; he has never entered into any general assumpsit with the public, and it has never pretended to have any claim to have him work for reasonable compensation.

There is, we submit, no fixed and inherent element of publicity in a floating elevator, and therefore no law can determine that all elevators are public. If a floating elevator may become public it is because of elements of publicity which may affect her to-day and be absent to-morrow, and therefore a statute must leave the owner his common-law choice to be public and common and subject to regulation of rates or to remain private and free.

"A legal declaration that the owner of a certain existing piece of property shall receive only a certain compensation for its use or for the service of the owner has none of the characteristics of a law. It

is not a rule of action prescribed by the supreme power, but is in the nature of a judgment or decree appropriate to be pronounced by the judicial department where the rules of law would warrant it after a proper hearing, and the fact that the property may be clothed by law with a public interest or a public use would make no difference in its constitutionality or propriety.

"Mr. Cary arguendo in Minnesota case.

"'The legislative power extends only to the making of laws, and in its exercise is limited and restrained by the paramount authority of the Federal and State constitutions. It cannot directly reach the property or vested rights of the citizen by providing for their forfeiture of transfer to another without trial and judgment in the courts, for to do so would be the exercise of a power which belongs to another branch of government and is forbidden to the legislative.

"'Newland *vs.* Marsh, 19 Ill., 376–382.

"'That is not legislation which adjudicates in a particular case, prescribes the rule contrary to the general law, and orders it to be enforced. Such power assimilates itself more to despotic rule than any other attribute of government.'

"Irving's Appeal, 16 Penn. St., 266."

In *Hurtado vs. California* (110 U. S., 516) this Court wrote as follows:

"It is not every act legislative in form that is law. Law is something more than mere will exerted as an act of power. It must not be a special rule for a particular person or a particular case, but, in the language of Mr. Webster, in his familiar definition, 'The general law, a law which hears before it condemns, which proceeds upon inquiry and renders judgment only after trial,' so 'that every citizen shall hold his life, liberty, property, and immunities under the protection of the general rules which govern society,' and thus excluding as not due process of law acts of attainder, bills of pains and penalties, acts of confiscation, acts reversing judgments, acts directly transferring one man's estate to another, legislative judgments and decrees, and other similar special, partial, and arbitrary exertions of power under the forms of legislation. Arbitrary power, enforcing its edicts to the injury of the persons and property of its subjects, is not law, whether manifested as the decree of a personal monarch or of an impersonal multitude; and the limitations imposed by our constitutional law upon the action of the governments, both State and National, are essential to the preservation of public and private rights, notwithstanding the representative character of our political institutions. The enforcement of these limitations by judicial process is the desire of self-governing communities to protect the rights of individuals and minorities as well against the power of numbers as against the violence of public agents tran-

scending the limits of lawful authority, even when acting in the name and wielding the force of the government."

We submit that the judgment in the Minnesota case disposes of this point. In criticising the act Mr. Justice Blatchford wrote:

"No hearing is provided for, no summons or notice of the company before the commission has found what it is to find or declared what it is to declare, no opportunity provided for the company to introduce witnesses before the commission; in fact nothing which has the semblance of due process of law. * * * If the company is deprived of the power of charging reasonable rates for the use of its property, and such deprivation takes place in the absence of an investigation by judicial machinery, it is deprived of the lawful use of its property, and thus in substance and effect of the property itself, without due process of law."

Surely a determination of the character of property or the status of its owners is as sacred as the decision what rates he may charge for its use, and the result may equally deprive him of that use, and so of that property, and so this law is void because it declares Mr. Annan's elevator public and common without giving him a day in court.

**Point six.**

Finally and in conclusion we submit that every principle which should govern legislation is violated by this law.

In People *vs.* Gillson (90 N. Y., 48) Judge Peckham wrote:

"It is quite clear that some or all of those fundamental and valuable rights are invaded, weakened, limited, or destroyed by the legislation under consideration.

"*It is evidently of that kind which has been so frequent of late, a kind which is meant to protect some class in the community against the fair, free, and full competition of some other class, the members of the former class, thinking it impossible to hold their own against such competition, and therefore flying to the legislature to secure some enactment which shall operate favorably to them or unfavorably to their competitors in the commercial, agricultural, manufacturing, or producing fields.*"

This quotation aptly describes the law we now challenge. It is class legislation of the worst kind meant to help one class make money by restraining the freedom of another class. It will beget more of its own kind.

"Among the most important effects of a legislative act must be placed the expectations which it creates of future similar or apparently similar acts. People are always reasoning—well or ill—usually ill. Accordingly every conspicuous act which is done becomes a precedent on which many future claims are based."

Jevons, The State in Relation to Labor, 18.

This Court, as the final arbiter of the rights of property, is concerned not only with this particular example of communistic legislation, but also with the tendency which the example reflects. The tendency is both popular and legislative. A large and apparently increasing number of people seem to believe that Government, State, local, and national, is merely a convenient instrument of advantage to be used by those who can control or influence its course for their own benefit, regardless of the interests and rights of others. This is the conception a good many people have of popular government and what they call the rule of the majority. If they want anything they ask the legislature or Congress to give it to them in utter indifference to the question whether or not the gift may involve the robbery of some one else or the violation of the rights of others. In their turn a large school of politicians in legislative place seem to regard it as their right to make any enactment which they regard as likely to satisfy the demands of those upon whom they are dependant for political promotion. The doctrine of passive obedience to constituents is openly avowed by many men in public life and carried into demagogic practice by many who are not quite brazen enough to avow it.

In these and all like cases the essential spirit of American institutions is set at naught and property rights and freedom of contract are trampled under foot. Worse still, if worse be possible, by every such legislative act the dangerously false conception that government is an instrument to be used for personal or class advantage by whomsoever can control it, and that its powers and functions exist for other than public purposes, is strengthened in the public mind. The strength and beneficence of our institutions are due to the general acceptance of the American idea of individual liberty, and a government restricted to the necessary functions of government. Through the enormous importation of men from other lands who have no sympathy with American ideas quite another view of the relations of government to affairs has come into vogue,

particularly in those parts of the country where the foreign-born population is large, and the tendency to communistic legislation is the result. It can be checked only by a resolute insistance upon the constitutional guarantees of life, liberty, and property.

BENJAMIN F. TRACY,
WILLIAM N. DYKMAN,
*Of Counsel for Plaintiff in Error.*

# REPORT

OF THE

## Committee on Foreign Commerce and the Revenue Laws

OF THE

# Chamber of Commerce of the State of New-York,

ON THE

## BILL BEFORE THE LEGISLATURE REGULATING ELEVATOR CHARGES.

*Adopted by the Chamber April 2, 1885.*

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NEW-YORK:
HENRY BESSEY, PRINTER,
No. 47 CEDAR STREET.

1886.

# REPORT.

*To the Chamber of Commerce:*

Your Committee on Foreign Commerce and Revenue Laws, to whom have been referred the questions of grain elevator charges, and of the bill with reference to these charges now pending before the Legislature, have given this subject their careful consideration; they have studied all the available material, and they have heard verbal arguments on both sides of the question, the result of all of which, with the conclusions reached by them, they now beg leave to report as follows:

Section 1 of the bill purports to limit the charge for elevating, receiving, weighing and discharging grain, by means of floating or stationary elevators, to a maximum rate of one-half of one cent per bushel, and the charge for trimming or shoveling grain to and from the leg of the elevator to the actual cost of these operations.

Sections 2, 3 and 4 fix the penalties and the manner of recovering them, and section 5 exempts all cities of less than 130,000 inhabitants from the operation of the act, thereby making the law applicable only to New-York, Brooklyn and Buffalo.

The bill is similar in effect to bills introduced in 1882, 1883 and 1884, which, after careful investigation, failed to pass the Legislature. It will be noticed that this bill makes no distinction between stationary and floating elevators, and does not attempt to regulate the charge for storage in the stationary elevators.

The bill has been introduced at the instance of the owners of boats running on the Erie Canal, who appear as the principal, if not the only defenders of the measure.

Their arguments may be summed up as follows:

1. That the elevator charges now paid in the ports of New-York and Buffalo are far higher than the charges for the same service in Chicago, and higher also than those of other seaports.

2. That these charges are so far in excess of the actual cost of the service rendered as to be unjust and extortionate.

3. That these excessive charges are the main cause of the increasing diversion of the grain trade from New-York to other seaports.

4. That they bear with especial hardship on the canal-boat interest, which will be speedily destroyed by their continuance.

5. That they are maintained and enforced by powerful combinations of elevator owners.

6. That an undue amount of capital has been invested in elevators, and that these excessive charges are maintained in order to keep the whole property invested productive.

7. That the constitutionality of the legislative restriction has been fully established by the decision of the United States Supreme Court in the case of Munn *vs.* Illinois.

Your Committee are of opinion that if only the first two of these assertions were proved to be well founded, there would be sufficient cause for applying all just means toward the abatement of such unnecessary charges, which could not fail to work injury, not only to the boatmen, but to all interests concerned in the commerce of our City and our State.

Before entering upon an analysis of these assertions, your Committee desire to point to some significant facts which should go far in cautioning our Legislature against the danger of being moved to action by a popular outcry against monopoly and extortion. Who, it may be asked, is more interested in the prosperity and growth of our grain trade than these so-called extortioners, our elevator owners? But if they are taken to be blind to their own true interest, can we suppose the same to be the case with our grain receivers, dealers, exporters, brokers, and with our ship-owners, all of whom are equally interested in the growth of the grain business, and but few of whom are or can be interested in elevator property? Is it reasonable to suppose that these men are all under the influence of a combination of a comparatively small number of other men? Are they not all members of the New-York Produce Exchange, and has not that Exchange, on previous occasions, protested against legislative interference in this matter? Have they not, during the present agitation, and at a meeting called for the purpose and largely attended, remonstrated with rare unanimity against the passage of this bill?

These questions will appear all the mere pertinent, when it is considered how invaluable and indispensable an element the elevator service is to our grain trade; how impossible it would be to go back to the former system of handling grain by hand and horse-power, and how much more damage a partial interruption or crippling of the elevator service would do to our trade than could be repaired by years of reduced charges.

If, on an examination in detail, to which your Committee will now proceed, the assertions made by the promoters of the bill are

found to be erroneous, it will be clearly dangerous to interfere by legislation, and any evil feature of the present system should be left to be corrected by the ordinary remedy of competition.

### 1. THE RELATIVE CHARGES IN CHICAGO, BUFFALO AND NEW-YORK.

The assertion that the New-York and Buffalo elevator charges are far higher than those of Chicago is supported by the following comparative statement, which has been published and urged by the boatmen :

CHICAGO CHARGES.

| | |
|---|---|
| Grain pays elevator, | $5 00 |
| Boat pays trimming out, | 2 00 |
| Vessel pays trimming in, | 75 |
| Total per 1,000 bushels, | $7 75 |

BUFFALO CHARGES.

| | |
|---|---|
| Grain pays elevator, | $7 50 |
| Vessel pays elevator for elevating, | 1 25 |
| Vessel pays elevator trimming out, | 4 50 |
| Boat pays elevator trimming in, | 1 25 |
| Total per 1,000 bushels, | $14 50 |

NEW-YORK CHARGES.

| | |
|---|---|
| Grain pays elevator, | $5 00 |
| Boat pays elevator trimming out, | 1 50 |
| Boat pays elevator per extortion, | 3 50 |
| Vessel pays elevator trimming in, | 2 00 |
| Vessel pays elevator for no service whatever, | 6 00 |
| Total per 1,000 bushels,* | $18 00 |

Your Committee have taken pains to verify these figures, and find themselves compelled to characterize them as deceptive and misleading in several important particulars.

CHICAGO CHARGES.

The statement of the charges at Chicago is found to be based entirely on the charges imposed on the small quantity of grain received there by canal, which enjoys an exceptional position, being open to the competition of all elevators, and used for filling up gaps in the supply of railroad grain, for which there is no general competition. Of the 57½ million bushels of grain that passed through the Chicago elevators during the year ending October 31st, 1884, less than 2½ millions were received by the Illinois River Canal. Even on this small quantity the charges given at $7.75 appear to

* For more convenient comparison the calculation of charges per 1,000 bushels will be continued in this report.

be understated by 50 to 75 cents; they should be $8.55 to $8.50, since, from the information received from reliable sources, the cost of trimming in lake vessel is nearly double that given in the statement. It is, however, clearly unfair to take these exceptionally low charges on canal grain as a basis for the comparison, and to ignore the fact that over 95 per cent. of all grain passing through the Chicago elevators pays the charges established by the laws of Illinois, which are as follows:

| | |
|---|---|
| For elevating, weighing and delivering, including 10 days' storage,... | $12 50 |
| To which has to be added for trimming to lake vessel, ($1.25 to $1.50,) | 1 37 |
| | $13 87 |

To these charges one-half cent per bushel, or $5 per 1,000 bushels, is added for every additional 10 days or part of 10 days' storage. This charge for storage in Chicago is likewise fixed by law, and it will be seen further on, how important an element it is in any comparison with New-York charges.

### BUFFALO CHARGES.

The statement as to the charges made by the elevators at Buffalo appears to be exaggerated in the item of cost of trimming out of lake vessel, which is stated at $4.50, while the information obtained by your Committee shows this to be a varying charge, averaging about $3.50. The total cost given at $14.50 should, therefore, be reduced to $13.50, which brings the Buffalo charge below the actual cost of the service at Chicago.

### NEW-YORK CHARGES.

In considering the charges at our own port your Committee must first remark, that the service of the railroad elevators must be left out of consideration, since they make no special charge for elevating the grain arriving by their respective roads, the charge being included in the freight, while the grain is subject to a second elevation when shipped or stored in another stationary elevator—which, for various reasons, is frequently done. With one exception, the railroad elevators are located in another State, and none of them could be affected by the law now pending.

The remaining elevators, storage and floating, perform each a service so different from the other, and operate under conditions so different, that in comparing their charges with those at the Chicago elevators, the two classes must necessarily be considered separately.

Grain received in our storage elevators situated on the Brooklyn water front is charged as follows:

| | |
|---|---|
| For receiving, elevating, weighing and delivering, including trimming out and 10 days' storage,..... | $10 00 |
| For spouting into vessel and trimming in bulk, average charge,..... | 7 00 |
| | $17 00 |

The $3.13 excess of cost over the regular Chicago charges find sufficient explanation in various circumstances connected with the New-York service, such as the much higher cost of the ground occupied by our elevators and their higher taxation ; the greater cost of trimming-in in ocean steamers than in lake vessels, which are built with special reference to the carrying of grain ; and the much greater steadiness in the supply of grain to the Chicago elevators, compared with that to the New-York elevators.

The comparison, however, yields a very different result when the important item of storage is included. While the Chicago elevators are by law authorized to charge and do charge ½c. per bushel storage for every ten days, or any part thereof after the first ten days, the charge at New-York is now and has long been ¼c. for the same number of days. 1,000 bushels of grain held in elevator for 30 days will pay—

IN CHICAGO.

| | |
|---|---|
| For elevating, weighing and 10 days' storage, | $12 50 |
| For trimming to lake vessel, | 1 37 |
| For two terms storage, ½c. per bushel each, | 10 00 |
| | $23 87 |

IN NEW-YORK.

| | |
|---|---|
| For elevating, weighing, trimming out, &c., and 10 days' storage, | $10 00 |
| For trimming to ocean vessel, | 7 00 |
| For two terms storage, ¼c. per bushel each, | 5 00 |
| | $22 00 |

And every ten days further storage will increase the difference in favor of New-York by $2.50.

It may here be mentioned that the first law passed by the State of Illinois regulating elevator charges fixed these charges, including the first ten days' storage, at 1½c. per bushel, and the storage charge for every subsequent ten days at ¼c. This law had scarcely been confirmed by the United States Supreme Court, when the Chicago elevator owners found that they could not live on the charge ; they at once petitioned and obtained from their Legislature an amendment to the Act, by which the elevating charge, including the first ten days' storage, was reduced to 1¼c. per bushel, while the charge for subsequent storage was increased from ¼c. to ½c. It is clear, therefore, that the Chicago elevators rely for their compensation more on the storage than on the elevating charge ; while the New-York elevators are more benefited by the latter than by the former. There can be no doubt, however, that with the present rate of charges the Chicago elevator has a great advantage over the New-York elevator in both charges combined. It not only has a steadier supply of grain throughout the year than the New-York elevator, whose supply by canal is stopped for about six months in the year, but the Chicago elevator, when it is filled up at the end of the shipping season, also has a much better chance of holding that supply till the re-opening of navigation ; while the New-York elevator,

though likewise filled up at the close of canal navigation, immediately after begins to lose its supply, and is apt to be half empty before the winter is half gone, and to be all but empty when the canal opens again. The New-York elevator is further under a disadvantage with respect to winter storage by the competition of the numerous canal-boats laid up and holding their grain on storage through the winter. Under the proposed law there would be nothing to prevent our storage elevators from modifying their charge in conformity with the law, and of making up the loss on elevating charges by making a corresponding addition to their charge for storage. The pending bill, therefore, appears to be mainly directed against the

FLOATING ELEVATORS,

that have no opportunity for recouping themselves by a similar change in the manner of making charges, and whose position with reference to the question has to be considered by itself.

Their charges vary somewhat according to the character of the ship or steamer into which the grain is elevated; a difference is also made between shipments made in bulk and those made in bags. The cost of elevating and weighing is the same as is made by stationary elevators, viz., $10; the cost of spouting and trimming in steamers varies between $6.25 and $8, averaging about $7. The boatmen's statement puts down the highest figure and makes the total cost $18, whereas the total average charge probably does not exceed $17. In comparing these charges with those of Chicago the nature of the service performed in the two places must necessarily be considered. The boatmen's statement assumes the two services to be the same, whereas even a superficial examination shows them to be widely different. In Chicago the transfer is done by a stationary elevator, both the boat or car bringing the grain in and the vessel or car receiving the grain being brought alongside of the elevator. In New-York the floating elevator has to be moved all over the port, from one ocean steamer or vessel to another, each of them frequently requiring but a few hours actual work. This necessarily involves expense for moving the elevator, more or less risk of river navigation, and great loss of time over and above that consumed in the actual operation of elevating. The amount of business done in New-York at any one time depends much more upon the fluctuating conditions of the foreign and the home markets than does the business at Chicago, where the bulk of the grain comes in in a steady stream and only the outgo is dependent upon the state of the markets. It is well known that the operations of shipping grain abroad almost always have to be done in great haste, and that prompt and careful action on the part of the elevators, the employment of intelligent and skilled labor, and a large proportion of costly night work are required in order to meet the wants of the numerous ocean steamers that sail at an appointed hour, and must be loaded within a given short time.

From these and from other reasons, that will hereafter be re-

ferred to, it must be clear that the two services are sufficiently different to account for the above stated difference between the New-York and the Chicago charges.

The further assertion of the boatmen that the New-York charges are unduly higher than those incurred by the grain received at the neighboring seaports is found to rest on no better foundation. In Boston, Philadelphia and Baltimore, where the bulk of the grain arrives by rail and is handled almost exclusively by stationary elevators connected with the roads, the regular charge for elevating, weighing and delivering is $12.50, including five or ten days' storage. When grain is received from boat, the charge in Baltimore is $15. To this has to be added the usual charge for trimming into steamer when received by her at the elevator. These charges, therefore, even in the most favorable cases, can be but little, if any, below those incurred by grain loaded at the stationary elevators of our port. In the port of Baltimore, where, according to the boatmen's statements, the most damaging competition is going on, it will, however, be found that by no means all steamers are loaded at the elevators ; all regular berth steamers are compelled to forego that advantage, and prefer to have their grain bagged at the elevators, from which they have the bags lightered alongside and taken on board at ship's expense, like other cargo. In all such cases the total cost of transfer that falls on the grain shipped through Baltimore more or less exceeds the cost of transfer at our port.

The lower transfer charges paid at the Canadian Lake ports, which are in like manner used as an argument in favor of the bill, your Committee find, cannot form a fair basis for comparison. The elevators performing the service in those ports are invariably owned or controlled by the railroads connecting with them, and stand in the position of our railroad elevators, whose charges are included in the freight. The paramount object of those elevators is to attract freight, and their low charges cannot be considered proof of the actual cost of the work done by them.

### 2. ARE OUR CHARGES EXCESSIVE ?

In stating the result of their examination into this second assertion, your Committee observe that the arguments advanced by the boatmen evidently are based on the proposition that, whenever there is a large and steady business done, elevators can be profitably worked at much lower cost than that recovered through the present charges. This proposition is not denied by our elevator owners, or by any one else. It is self-evident that the cost of maintaining and working elevators, expressed in so many cents per bushel of grain elevated within a certain period, depends largely upon the quantity of grain so elevated. To fix the cost per bushel by basing the calculation on the cost of operating an elevator worked continuously to its full capacity, or any thing near it, clearly is an absurdity, when we know, as a matter of fact, that such full occupation can but rarely occur, and that for a number of years past our elevators have not been worked under any such favorable conditions. The

total storage capacity of our stationary elevators, railroad elevators included, is but little below the capacity of the Chicago elevators; but while the average quantity held by the latter for each day of the year 1884 was about 15,000,000 bushels, the average held by our storage elevators during the same season amounted only to 7,130,000 bushels. The element of storage has already been referred to, and your Committee deem it unnecessary to enlarge upon the result of the business done by our storage elevators during the past four years further than to state their full belief in the truth of the assertion, that during that period the net profits realized by these elevators have not amounted to simple interest on the actual cost of the property.

That the results realized by the floating elevators is not much better is not only asserted strenuously by the owners and managers of these elevators, but is supported by the statements of numerous reliable private individuals interested in one or the other of the two companies that own and manage twenty-five of the twenty-nine floating elevators existing in New-York. Their testimony is corroborated by the facts as ascertained by your Committee with regard to the cost and daily expenses of these elevators, and the average amount of business done by them during the past few years.

The older of the two companies, that has worked five elevators during the past twenty years, has, during the past four years, paid but one dividend amounting to six per cent.; their stock is offered at one-half of what it was worth five years ago. The elevators have, during the past year, averaged 4,100 bushels a day, while their capacity of work, under ten hours' steady employment, is 40,000 bushels a day each. Their average charges collected last year amounted to $15.40 per 1,000 bushels, equal to $63.14 for the daily average work done by each of their elevators, while the daily average of expenses of each elevator, including office expenses, is stated at $65.33, thus showing an actual loss.

The larger company, operating twenty floating elevators, has been stated to have realized and paid dividends amounting, last year, to nine per cent. of the nominal value of the stock. On investigation your Committee find, however, that the company insure only the risk of fire, and that any individual shareholder that desires to insure the risk of river navigation has to pay a premium which will reduce the net dividend on his interest to between five and six per cent. The average work performed by their elevators during the past year is stated to have been 5,000 bushels, their average capacity, with ten hours' steady employment, 40,000 bushels. The cost of an elevator of that capacity is stated to be from $35,000 to $40,000; average daily expenses, including cost of trimming, but exclusive of office charges, from $62.50 to $73.50, according to their size and to the nature of the employment. Taking the average charges for 1,000 bushels elevated at $17, the daily average earnings of each elevator would amount to $85—thus leaving from $12.50 to $22.50 for covering office expenses, extra insurance, depreciation and dividend. If these figures are only approximately correct, as your

Committee believe them to be, it will clearly appear that the business of transferring grain by floating elevators cannot be done for the maximum charge of $5 per 1,000 bushels, as fixed in the bill, together with the mere cost of the labor for trimming, because, on an average daily work of 5,000 bushels, the daily earnings of each elevator would be reduced to $25. If by the somewhat indefinite language of the bill it is intended to limit the charge for trimming to the actual wages paid to the trimmers, and to allow nothing to be charged for superintending the work, it is difficult to see how any Elevator Company could undertake the work. The steamers would have to do the trimming themselves, probably at a cost exceeding the present charge, and with a less satisfactory result as to the quality of the work, which can be done well only when combined with elevating and under the same supervision. The trimming of grain, it may here be observed, requires skilled labor, and is a somewhat dangerous operation.

### 3. IS TRADE DRIVEN AWAY?

Your Committee clearly consider it a fallacy to maintain that our elevator charges have had any appreciable share in diverting any portion of the grain trade properly belonging to New-York to other seaports. They are convinced that for whatever diversion of this trade has taken place sufficient causes are to be found in the competition of our trunk roads, and the system of cutting freight rates adopted by them.

### 4. BEARING ON CANAL INTERESTS.

The assertion that our elevator charges bear with particular hardship on the owners of canal boats cannot be admitted to be well founded. The prime cause of the decline of the interests connected with the Erie Canal, and of the usefulness of the canal itself, can be found in nothing but in the competition of our railroads. The elevator charges fall alike on canal grain and on railroad grain, and as the proposed reduction of the elevator charges is to apply alike to both classes of grain, it is impossible to see that their relative position would, in the least, be affected by the passage of the bill under consideration. The expectations entertained by the boatmen as to the effect of the measure on the general volume of business passing through our port, your Committee think, are exaggerated and have no foundation whatever, unless the charges are proved to be excessive.

The boatmen lay particular stress on the fact, that by the custom established at our port, they are compelled to pay $5 per 1,000 bushels, as their portion of the elevator charges, and they claim that anything beyond the $1.50, that may be charged to them for shoveling the grain to the leg of the elevator, and which is included in the above charge, is an unjust extortion. This argument, your Committee submit, is not valid. The custom of charging the canal boat one-half cent per bushel, as cost of trimming and part of cost of

elevating, arose from the duty imposed upon every boat, canal or other, of delivering her cargo on the string-piece of a dock, which necessarily involves some elevation. But whether the charge for this elevation is paid by the boat or by the grain, can make no appreciable difference either to the boat or to the grain. If paid by the boat, it forms a regular item of expense, and will be calculated in fixing the rate of freight. Whoever may pay it, it will, in the end, fall on the grain like the rest of the charges, and no change in the mode of collection can make a particle of difference to any especial interest concerned in the transaction.

### 5. COMBINATIONS.

The assertion as to unjust combinations of elevator owners in order to maintain excessive charges is made with more show of reason against the Buffalo elevators than against those of New-York. The former pool and divide their profits among all their elevators, without regard to their having been active or not. In New-York there is no pooling nor even any formal understanding as to the maintenance of any fixed charges; but the existence of a regular uniform tariff of charges is a necessity that will enforce itself under all circumstances; every dealer in grain and every shipper and ship-owner, in making his contracts, must know before hand what charges he will have to pay, and he generally has no time for making a special bargain. The existence of such a tariff, however, does not exclude the possibility of grading the charges according to circumstances. Your Committee understand that with the storage elevators here as well as in Chicago, it is a frequent practice to allow a rebate on the regular charges, either for elevating or for storage, whenever the elevator owner thinks that by doing this he can gain sufficient other advantage. Even the floating elevators occasionally make such rebates, and it is difficult to see how such a practice can be avoided or why it should be declared improper. By doing this the elevator owners accommodate themselves as best they can to the varying exigencies of a fluctuating business, and there can be no doubt that these rebates inure to the benefit of our grain trade, and amount in reality to a reduction of the regular charges, though it is impossible to estimate the actual extent of such reduction.

### 6. EXCESSIVE NUMBER OF ELEVATORS.

The last argument in favor of the bill, to which your Committee desire to refer, consists in the assertion that both here and in Buffalo the charges have to be maintained in order to keep the capital invested in a useless number of elevators productive. This proposition may, in a measure, be conceded to be true, and it would undoubtedly be very desirable and lead to a voluntary reduction of charges, if any means could be discovered to regulate and grade the number of elevators at all times even approximately to the momentary wants of business, without, however, exposing our

whole grain trade to the serious risk of being crippled for want of elevator facilities, whenever any sudden increase of business, and with it the cherished chance for profitable activity, arises.

But the nature of the grain trade in New-York is such that every elevator in this port at times is needed. During the season of canal navigation, (from the middle of May to the end of November,) the receipts of grain by the canal equal nearly forty millions of bushels. They must be promptly cared for on arrival, and the machinery for doing so must be available; but after the season closes this demand suddenly ends, and both storage and floating elevators have to await its return in the following year; meanwhile the stationary elevators must be always ready to deliver the grain held on storage when called for, and the floating elevators must be ready to handle the railroad grain that is daily received and distributed throughout the winter.

It is well known that even during the past few years of dullness and light exports, periods of sudden and spasmodic activity have occurred in the winter seasons, when all the elevating facilities had to be called into requisition to do the business that offered. Where should we be if any sudden emergency like a great war or a failure of the crops in Europe were to arise, and found our port unprepared to handle the grain that seeks the foreign markets? It may be difficult to determine what surplus of facilities should be on hand in dull or even in moderately active times, but sure it is that no surplus of any consequence whatever will be kept on hand if that surplus is prohibited from sharing the returns derived from the existing trade. The boatmen themselves would be the last to agree on their present theory if the principle were to be applied to their boats, of which, according to their own statements, there has for some years been a useless surplus in existence; nor have the boatmen ever been backward in raising their rate of freight whenever there was an opportunity.

Their statements with regard to the combination existing at Buffalo are found to be exaggerated. They assert that out of 38 available elevators only eight have been in operation during the past season. The facts, as represented by the other side, are, that of the total number of 38 elevators, thirteen are floating elevators or elevating towers, without storage capacity; that of the remaining 25 storage elevators, sixteen were more or less operated during the past season, and that these sixteen represented over 75 per cent. of the total elevator capital invested in Buffalo. Account must also be taken of the fact that the port of Buffalo will always need a large reserve of elevating capacity, in order to provide not only for any sudden increase of business, but also for the contingency of a break in the canal, which is always immediately followed by a large accumulation of grain at that port. Your Committee do not wish to defend the system of pooling, which has for many years been kept up in Buffalo, but they must insist that the facts above stated show the necessity of great caution in dealing even with a state of things that is really objectionable.

## 7. THE QUESTION OF CONSTITUTIONALITY.

Your Committee do not feel competent to argue the legal side of the question of constitutionality. They merely desire to point to one important fact, which appears to them to establish an essential difference between the facts passed upon by the decision of Chief Justice WAITE and those involved in the question of elevator charges at New-York. Of the Chicago elevators it could with good reason be held, that "they stand in the gateway of commerce and take toll from all who pass," since these elevators are all attached to certain railroads, and the grain received over any of them has no choice but to go into the particular elevator attached to the road. Here in New-York there is no such compulsion; the receiver of grain can select whatever means of transfer he desires to employ; nor is there anything to prevent capitalists from building new elevators and accepting any compensation for their services that may be satisfactory to them.

Enough has been said to show the impropriety and danger of legislative action, unless the truth of the principal facts asserted by the promoters of the bill, and the justice and necessity of the proposed restriction of private rights has been established beyond doubt.

Being convinced that neither of these requisite conditions have been fulfilled, your Committee feel bound to report against the enactment of the bill pending, and they, therefore, recommend the adoption of the following preamble and resolution, to wit:

*Whereas*, In the opinion of this Chamber, the passage of the bill now pending in the Legislature, entitled "An Act to regulate the fees and charges for elevating, receiving, weighing and discharging grain," &c., while it would in no way promote the commercial interests of this State, would prove unjust, oppressive and even destructive to the elevator interests of this port; therefore,

*Resolved*, That the Legislature be petitioned by this Chamber not to pass this bill, and that a copy of this resolution, together with a copy of this report, be transmitted to each member.

Respectfully submitted by

JAS. W. ELWELL,
GUSTAV SCHWAB,
WM. H. GUION,
JOHN E. ALEXANDRE,
*Committee on Foreign Commerce and Revenue Laws.*

NEW-YORK, *April* 2, 1885.

Office Supreme Court U. S.
FILED.
NOV 11 1891
JAMES H. McKENNEY
Clerk.

# Supreme Court of the United States.

**OCTOBER TERM, 1891.**

*No. 645.*

THE PEOPLE OF THE STATE OF NEW YORK EX REL. FRANCIS E. PINTO, PLAINTIFF IN ERROR,

*vs.*

ANDREW WALSH, POLICE JUSTICE OF THE CITY OF BROOKLYN, AND CLARK D. RHINEHART, SHERIFF OF THE COUNTY OF KINGS, DEFENDANTS IN ERROR.

*In Error to the Supreme Court of the State of New York.*

## BRIEF FOR PLAINTIFF IN ERROR.

BENJAMIN F. TRACY,
WILLIAM N. DYKMAN,
*Of Counsel for Plaintiff in Error.*

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.

## 7. THE QUESTION OF CONSTITUTIONALITY.

Your Committee do not feel competent to argue the legal side of the question of constitutionality. They merely desire to point to one important fact, which appears to them to establish an essential difference between the facts passed upon by the decision of Chief Justice WAITE and those involved in the question of elevator charges at New-York. Of the Chicago elevators it could with good reason be held, that "they stand in the gateway of commerce and take toll from all who pass," since these elevators are all attached to certain railroads, and the grain received over any of them has no choice but to go into the particular elevator attached to the road. Here in New-York there is no such compulsion; the receiver of grain can select whatever means of transfer he desires to employ; nor is there anything to prevent capitalists from building new elevators and accepting any compensation for their services that may be satisfactory to them.

Enough has been said to show the impropriety and danger of legislative action, unless the truth of the principal facts asserted by the promoters of the bill, and the justice and necessity of the proposed restriction of private rights has been established beyond doubt.

Being convinced that neither of these requisite conditions have been fulfilled, your Committee feel bound to report against the enactment of the bill pending, and they, therefore, recommend the adoption of the following preamble and resolution, to wit:

*Whereas*, In the opinion of this Chamber, the passage of the bill now pending in the Legislature, entitled "An Act to regulate the fees and charges for elevating, receiving, weighing and discharging grain," &c., while it would in no way promote the commercial interests of this State, would prove unjust, oppressive and even destructive to the elevator interests of this port; therefore,

*Resolved*, That the Legislature be petitioned by this Chamber not to pass this bill, and that a copy of this resolution, together with a copy of this report, be transmitted to each member.

Respectfully submitted by

JAS. W. ELWELL,
GUSTAV SCHWAB,
WM. H. GUION,
JOHN E. ALEXANDRE,
*Committee on Foreign Commerce and Revenue Laws.*

NEW-YORK, *April 2*, 1885.

Office Supreme Court, U. S.
FILED.
NOV 11 1891
JAMES H. McKENNEY

# Supreme Court of the United States.

**OCTOBER TERM, 1891.**

*No. 645.*

THE PEOPLE OF THE STATE OF NEW YORK ex rel. FRANCIS E. PINTO, Plaintiff in Error,

*vs.*

ANDREW WALSH, Police Justice of the City of Brooklyn, and CLARK D. RHINEHART, Sheriff of the County of Kings, Defendants in Error.

*In Error to the Supreme Court of the State of New York.*

## BRIEF FOR PLAINTIFF IN ERROR.

Benjamin F. Tracy,
William N. Dykman,
*Of Counsel for Plaintiff in Error.*

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.

# Supreme Court of the United States.

**OCTOBER TERM, 1891.**

*No. 645.*

THE PEOPLE OF THE STATE OF NEW YORK EX REL. FRANCIS E. PINTO, PLAINTIFF IN ERROR,

*vs.*

ANDREW WALSH, POLICE JUSTICE OF THE CITY OF BROOKLYN, AND CLARK D. RHINEHART, SHERIFF OF THE COUNTY OF KINGS, DEFENDANTS IN ERROR.

*In Error to the Supreme Court of the State of New York.*

## BRIEF FOR PLAINTIFF IN ERROR.

The plaintiff in error is the lessor and manager of a stationary grain elevator on the Brooklyn shore in the harbor of New York. The history of his title to the water front upon which his elevator stands is the same as the history of all the other Brooklyn water fronts; and his rights therein before this statute was passed were those of other water-front owners.

These rights and the title to the Brooklyn water front have been the subject of litigation from time to time in the New York courts, and the especial attention of the Court is called to two cases: Wetmore *vs.* Brooklyn Gas Company, 42 N. Y., 384; Woodruff *vs.* Havemeyer, 106 N. Y., 129.

The first was the case of the master of a vessel who asserted a right to make fast his vessel to the gas company's wharf and load and unload there. The gas company resisted the claim and cut the vessel loose. The court of appeals decided in favor of the gas company, and held that its title to its wharf was perfect and absolute, and that it had a right to exclude all the world from the use of the wharf. In the head-note to this case is the following statement:

"The title of the riparian owners to lands acquired by erecting and filling in the wharves or bulk-heads on the lands under water as far as the permanent water line, under the authority conferred by the Legislature, is not held subject to any right of the public to use the same."

Woodruff *vs.* Havemeyer was an action for wharfage, in which Mr. Woodruff claimed the customary rate, and the Havemeyers refused to pay anything beyond the rates fixed by statute for public wharves. The court of appeals decided in favor of Mr. Woodruff's contention, and held that his wharves and water-front property were private; that no individual had any right to their use except by Mr. Woodruff's permission, and that the rates fixed by statute applied only to public wharves. Immediately in the rear of Mr. Woodruff's wharves are his grain warehouses, and but a few blocks away and held under the same title are the wharves and warehouses which Mr. Pinto leases. Their property in the water front and their rights are the same. We start, then, with the proposition that, under the common-law rule, the owners of the Brooklyn water front had, before the statute of 1888 was passed, the right to exclude

all persons from their property and to make for the use of their property what bargain they chose.

The relation of Mr. Pinto's warehouses and elevators to the grain commerce of the port of New York is this: Mr. Pinto receives grain coming by railroad or canal indifferently. The amount of grain coming by canal is substantially equal to that which comes by rail. By far the greater part of canal grain which comes to Mr. Pinto's store is at the end of its voyage, and goes into his warehouse for a term of storage. It may go abroad or it may be sold to a miller in the harbor of New York.

When the canal-boat arrives at Mr. Pinto's warehouse it has completed its voyage. The bill of lading governing the canal carrier obligates him to deliver his cargo upon the string-piece of the dock. (Record, p. 15.)

He should therefore pay for elevating the cargo out of his boat.

"The custom of charging canal-boats half a cent per bushel as cost of 'trimming' and part cost of elevating arises from the duty imposed upon every boat, canal or other, to deliver her cargo on the string-piece of the dock, which necessarily involves some elevation."

(Chamber of Commerce Report, p. 11.)

The "leg" of the stationary elevator consists of two wooden tubes, in which an endless belt with buckets attached moves up and down. These tubes are open at the lower end, and this lower end enters the hold of the canal-boat, and when the belt is set in motion each bucket carries its fill of grain out of the hold of the canal-boat and into the tower of the elevator. Very soon after the belt is set in motion the buckets carry all the grain which first covers them and which gravitation brings to them, and they clear a space around them, and were it not for "trimming" the operation would cease.

The elevator owner hires a gang of longshoremen to shovel grain from all parts of the hold of the canal-boat to the "leg" of the elevator, so that the buckets may always be covered with grain. This is "trimming" in the canal-boat hold, and this, under the law, the elevator owner must do at the actual cost of labor.

This is not, however, the portion of the work of the stationary elevator against which this law is particularly aimed. The law is intended particularly to apply to the operation of transferring grain cargoes from canal-boats to ocean vessels; and this is a work for which the stationary elevator and floating elevator are in constant competition. When Mr. Pinto is employed to load an ocean steamer it must come to his wharf, for his stationary elevator cannot be moved; and to his wharf must also come the canal-boats which have brought the grain to New York.

There are, as the records show, twenty-two stationary and thirty-one floating elevators. There is no combination among these elevators, but, on the contrary, a constant competition. (Mr. Annan's evidence, Record, p. 10; Mr. Pinto's evidence, Record, p. 13; Chamber of Commerce Report, p. 12 *et seq.*)

The Court will take judicial notice of the fact that Long Island has no railroads which bring grain from the West. It will take judicial notice also of the fact that the several railroad elevators in New York, Hoboken, and Jersey City take into store all the grain which the railroads bring to the port of New York. It will take judicial notice also of the fact that the bulk of the grain brought to New York by canal-boat goes into warehouses for a longer or a shorter term of storage, and that the canal-boat grain cargoes which are transferred direct from canal-boat to steamer are such only as are sold while in the canal-boat for immediate exportation. The bulk of the grain exported from New York goes abroad in what are known as "tramp" steamers, having no regular wharf and no appointed time of sailing. These

go to any point in the harbor where they can be most economically loaded; and whether such a "tramp" steamer will go to Mr. Pinto's wharf or to some other wharf or have her cargo loaded and stowed by a floating elevator depends almost exclusively upon the rates offered by the competitors. It is evident from this statement of the work done by the stationary elevators that their competition with the floating elevators never ceases. A stationary elevator in the city of Brooklyn cannot truthfully be said to stand in the gateway of commerce or be able to levy a tax or toll. Business is done with them only by people who seek them, and they are not sought unless they offer the best bargain.

When a canal-boat laden with grain arrives in the port of New York the master and the grain owner between them have a very wide choice. There are stationary elevators in Hoboken, Jersey City, New York, and Brooklyn; and to any of these the canal-boat may go. There are six firms operating floating elevators, all in competition; and the master of the canal-boat and the grain owner may employ any one of these firms. *Between them they must choose whom they will employ. There is no combination, but all are in competition and offering rebates to secure business.*

The questions of law arising upon these facts are substantially the same as the questions of law arising in the floating-elevator case, and this case is submitted upon the argument and authorities contained in the brief for the plaintiff in error in No. 644: The People of the State of New York *ex rel.* Edward Annan, plaintiff in error, *vs.* Andrew Walsh, police justice of the city of Brooklyn, and Clark D. Rhinehart, sheriff of the county of Kings, defendants in error.

BENJAMIN F. TRACY,
WILLIAM N. DYKMAN,
*Of Counsel for Plaintiff in Error.*

Office Supreme Court U. S.
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# Supreme Court of the United States.

**OCTOBER TERM, 1891.**

*No. 644. No. 645.*

PEOPLE EX REL. ANNAN AND PINTO

*vs.*

WALSH, POLICE JUSTICE, &C., AND RHINEHART, SHERIFF, &c.

## Addendum to brief for plaintiffs in error.

Upon point that it is a judicial question whether any given elevator is public and due process of law to determine whether an elevator is public requires a judicial inquiry.

Weismer *vs.* Village of Douglass, 64 N. Y., 91.
Matter Deansville Cemetery, 66 N. Y., 569.
Matter Niagara, &c., R. R. Co., 108 N. Y., 375.

II.

One of the earliest grants of Brooklyn water front was made by chapter 156, Laws 1848. This has been construed to be an absolute grant in fee.

Wetmore *vs.* B. G. Co., 42 N. Y., 384.
Wetmore *vs.* Atlantic, &c., Co., 37 Barb., 70.
Woodruff *vs.* Havemeyer, 106 N. Y., 129.

The following elevators are on wharves within the territory described in the act of 1848 (see Annan Record, p. 18):

F. Woodruff & Co.
Kelsey's stores.
Central stores.

The grant under which Mr. Pinto holds was made by chapter 268, Laws 1841.

The extension of wharves, docks, and warehouses has been in very recent years along Gowanus bay, and the settled policy of the State and city may be seen in two acts passed in 1884. Chapter 395 of the Laws of 1884 forbade the city to extend any streets beyond the high-water line over lands gained by the owners filling in to bulk-head and pier lines. Chapter 491 of the Laws of 1884 created a new pier and bulk-head line, and to all owners who already had grants this act extends these grants to the new lines "in fee simple."

Upon the faith of these grants hundreds of millions of dollars have been invested, and Brooklyn has become the warehouse of the port of New York.

III.

This law violates the Constitution of the United States in that it refuses to and takes from elevator owners the equal protection of the laws.

By this act owners of elevators in cities of less than 130,000 inhabitants are left free to make their own bargains, while in cities of over 130,000 population they are constrained to take the statutory rate.

Yonkers is a city of less than 130,000 inhabitants and so is Long Island City. The former adjoins New York city and the latter is separated from it only by the East river, and only a narrow creek—perhaps two hundred feet wide—separates Brooklyn and Long Island City. In Yonkers or

Long Island City or in Albany or Rochester an elevator owner is free, while in Brooklyn, Buffalo, and New York they are deprived of their freedom. Such a law deprives elevator owners in the larger cities of the equal protection of the laws.

The Railroad Tax Cases, 13 Fed. Rep., 722.
Santa Clara County *vs.* S. P. R. Co., 118 U. S., 394.
Barbier *vs.* Connolly, 113 U. S., 27.
Hayes *vs.* Missouri, 120 U. S., 68.

We very freely admit that the scope of legislation may be limited to a given locality, and this may be defined in terms of population, but if the court is able to see that "class legislation" is attempted the law is void. Here the defendants in error boldly avow that this legislation is for the class of canal-boat owners.

BENJAMIN F. TRACY,
WILLIAM N. DYKMAN,
*For Plaintiffs in Error.*

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NOV 4 1891
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CLERK.

OCTOBER TERM, 1891.

# Supreme Court of the United States.

## Error to the Supreme Court of New York.

No. 1104.

THE PEOPLE OF THE STATE OF NEW YORK EX REL. EDWARD ANNAN, PLAINTIFF IN ERROR,

*against*

ANDREW WALSH, POLICE JUSTICE OF THE CITY OF BROOKLYN, AND CLARK D. RHINEHART, SHERIFF OF THE COUNTY OF KINGS, DEFENDANTS IN ERROR.

No. 1105.

THE PEOPLE OF THE STATE OF NEW YORK EX REL. FRANCIS E. PINTO, PLAINTIFF IN ERROR,

*against*

ANDREW WALSH, POLICE JUSTICE OF THE CITY OF BROOKLYN, AND CLARK D. RHINEHART, SHERIFF OF THE COUNTY OF KINGS, DEFENDANTS IN ERROR.

## BRIEF FOR DEFENDANTS IN ERROR.

CHARLES F. TABOR, *Attorney-General of New York,*
*Of Counsel, Albany, N. Y.*

ALBANY:
THE ARGUS COMPANY, PRINTERS.
1891.

# United States Supreme Court.

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| THE PEOPLE OF THE STATE OF NEW YORK EX REL. EDWARD ANNAN, PLAINTIFF IN ERROR,<br>*against*<br>ANDREW WALSH, POLICE JUSTICE OF THE CITY OF BROOKLYN, AND CLARK D. RHINEHART, SHERIFF OF THE COUNTY OF KINGS, DEFENDANTS IN ERROR. | *No.* 1104. |

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| THE PEOPLE OF THE STATE OF NEW YORK EX REL. FRANCIS E. PINTO, PLAINTIFF IN ERROR,<br>*against*<br>ANDREW WALSH, POLICE JUSTICE OF THE CITY OF BROOKLYN, AND CLARK D. RHINEHART, SHERIFF OF THE COUNTY OF KINGS, DEFENDANTS IN ERROR. | *No.* 1105. |

## BRIEF FOR DEFENDANTS IN ERROR.

### STATEMENT.

The defendant Pinto was charged, upon the oath of Adam R. Gray (fols. 11–12, Pinto Case), with having, on the 21st day of June, 1888, at the city of Brooklyn, willfully and unlawfully violated the provisions of chapter 581 of the Laws of 1888; in that he did on that

day charge and exact from the complainant more than five-eighths of one cent a bushel for *receiving and weighing* a cargo of grain from the boat "Bessemer" into the Pinto Stores, of which the said Pinto was lessee and manager; and that on the same day, and at the same place, he did charge and exact more than the actual cost of trimming or shoveling to the leg of the elevator.

The defendant Annan was charged, upon the oath of John R. Taylor, with having, on the 21st day of June, 1888, at the city of Brooklyn, violated the provisions of said act, in that he did on that day, and at that place, charge and exact from the complainant more than five-eighths of one cent per bushel for *elevating*, *weighing*, *receiving and discharging* a boat load of grain from the canal-boat "A. B. Twombly" to the ocean steamer "Olinda," and that he did charge and exact from the canal-boat and its owner more than the actual cost of trimming and shoveling to the leg of the elevator, and that he did charge against the ocean steamer more than the actual cost of trimming the cargo, and that the elevating, etc., was done by the floating elevator "Ceres," of which said Annan was part owner and one of the agents. (See fols. 11–12, Annan Case.)

The defendant Pinto was held by the police justice upon the information and testimony given, and in default of bail was committed to the sheriff of Kings county (fols. 129, 133, Pinto Case), and the defendant Annan was also held, and in default of bail, committed to the said sheriff. (Fols. 37–38, Annan Case.)

Writs of *habeas corpus* and of *certiorari* were issued in both cases on the 22d day of June, 1888, by Hon. C. E. Pratt, Justice of the Supreme Court (fols. 2–9), Pinto Case; also fols. 2–9, Annan Case), both returnable on the 25th day of June, 1888, at the General Term.

The petition of Pinto (fols. 5, 9), alleged that his imprisonment and restraint was illegal, and that such illegality consisted in this: That the said act, being chapter 581, Laws of 1888, "*was unconstitutional and void, being in contravention of the Constitution of the State of New York, and in contravention of the Constitution of the United States.*"

The petition of Annan (fols. 5, 9, Annan Case) contains the same allegation.

Return was duly made in each case by the sheriff and police justice.

The General Term dismissed each of the writs and remanded the prisoners to the custody of the sheriff. (See fol. 35, Pinto Case, and fol. 40, Annan Case.)

The opinion of the General Term was delivered by Brown, J., and will be found at folio 37, Pinto Case.

Appeals were taken in each case by the defendants to the Court of Appeals.

No claim was made by the defendants that they were not guilty of the charges made against each, respectively, but they each insisted that the law in question was unconstitutional.

The Pinto case is known as the "Storehouse Case," and the Annan case as the "Floating Elevator Case."

It appears in evidence that the charges for elevating, receiving, weighing, discharging and transportation of

grain were fixed by the Produce Exchange of New York city; these charges are found in the Pinto Case (fols. 16 and 22), and the Annan Case (fols. 20 and 26).

A table was introduced in evidence showing the names of owners of floating and stationary elevators, their location and capacity.

It appeared in evidence (fol. 16, Pinto Case) that no warehouse receipt can pass current on the floor of the exchange unless licensed by the exchange, and that a meeting of the grain trade, since the passage of the elevator act (fol. 16), resulted in revising the prices to get around the act, and that new charges were made. (Fols. 16, 17, Pinto Case.)

In order to effect this change, Rule 26 of the grain rules was amended and appears at folio 23, Pinto Case.

The change consisted in an extra charge of *storage* and for *transportation* of one-half cent per bushel respectively.

The Court of Appeals affirmed the judgment of the General Term in each of the cases. (See People v. Budd, 117 N. Y., 1.) The prevailing opinion by Andrews, J., was rendered in the case of People v. Budd, argued at the same time with the appeals in these cases. (Fol. 62, Annan Case.) While the dissenting opinion by Peckham, J., was rendered in the cases of Annan and Pinto. (Fol. 102, Annan Case.) Writs of error were then taken to this court by the defendants. Inasmuch as the questions presented for argument are the same in both cases, it has not been thought necessary by the Attorney-General to print separate briefs, but both cases are here argued as one.

# POINTS.

## I.

Section 1 of chapter 581 of the Laws of 1888, which it is claimed the defendants violated, reads as follows: "The maximum charge for elevating, receiving, weighing and discharging grain by means of floating and stationary elevators and warehouses in this State shall not exceed the following rates, namely: For elevating, receiving, weighing and discharging grain, five-eighths of one cent a bushel. In the process of handling grain, by means of floating and stationary elevators, the lake vessels or propellers, the ocean vessels or steamships and canal-boats shall only be required to pay the actual cost of trimming or shoveling to the leg of the elevator, when unloading, and trimming cargo when loaded."

The defendants allege that this act is unconstitutional and void, being in contravention of the Constitutions of the State and of the United States.

It is assumed that the particular clauses referred to are respectively.

*First.* Section 8, sub. 3: The Congress shall have, power "To regulate commerce with foreign nations, and among the several States, and with the Indian tribes."

*Second.* Article 14, United States Constitution, section 1: "*Nor shall any State deprive any person of life, liberty or property without due process of law;*" and,

*Third.* Article 1, State Constitution, section 6: No person shall "be deprived of life, liberty or property without due process of law."

The Court of Appeals has decided that the statute in question does not violate the provisions of the State Constitution cited. "That decision is binding upon us unless some inhibition of the Constitution, or of a law of the United States is violated by it." (Field, J., Crowley v. Christensen, 137 U. S., 92.) The whole question, then, is now left to this court to decide as to which of the above provisions of the Federal Constitution, if either, does this statute of the State of New York violate. Upon this question it is confidently submitted by the People of the State of New York that within the decisions of this court the statute in question violates no provision of the Federal Constitution.

## II.

In the case of Munn v. Illinois (94 U. S., 113), there can be no question but the Supreme Court intended to and did decide that it was within the police power, reserved to the State, to legislate upon and regulate by law the charges which should be exacted by warehouses and elevators for the storage and handling of grain. There is no dispute either that the defendants in that case were the owners individually of the warehouse or elevator which was the subject of the litigation, and that this building had been constructed before the adoption of the State Constitution in 1870. Neither can it be said that the adoption of this Constitution in any way extended the authority of the Legislature to

pass the statute under which the defendants were indicted. But it was held unequivocally that, under the powers inherent in every sovereignty, a government might regulate the conduct of its citizens towards each other, and, when necessary for the public good, the manner in which each shall use his own property ; and that it had been customary in the exercise of these powers, from time immemorial in England and in this country from its first colonization, to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers and inn-keepers, and in so doing to fix a maximum charge to be made for services rendered, accommodations furnished and articles sold, and that when the owner of property devotes it to a use in which the public has an interest he, in effect, granted to the public an interest in such use, and to the extent of that interest submits to be controlled by the public for the common good as long as he maintains the use; and in so holding the court said it was establishing no new principle in the law, but only giving new effect to an old one. To this doctrine all of the court assented except Justices Field and Strong. The dissenting opinion of Justice Field in this case shows clearly that there could be no mistake as to what the majority of the court intended to hold, and while it may be admitted that his opinion is the strongest possible presentation of an argument why the court should not have so held, the question is certainly, so far as the Supreme Court of the United States is concerned, *stare decisis*, unless it can be clearly shown that since that decision this court has repudiated the principles enunciated by that case.

Following this case are the cases of the Chicago, Burlington and Quincy Railroad v. Iowa (94 U. S., 155), and Peik v. Chicago and Northwestern Railway (94 U. S., 164). Whatever doubt may exist as to what was intended to be decided by this court regarding some of the questions discussed by the judges in the opinions delivered in the three cases cited, it seems to me there can be no mistake that as to one question, and that the main question argued in the Court of Appeals of New York in the cases under consideration, this court has not intended that there should be any doubt.

In the case of Wabash Railroad Company v. Illinois (118 U. S., 568), Mr. Miller, J., delivering the opinion of the court, having called attention to these cases, says: "These three cases, with others concerning the same subject, were argued at the same time by able counsel, and, in relation to the different laws affecting the subject, of the States of Illinois, Iowa, Wisconsin and Minnesota; *the main question in all the cases being the right of the State to establish any limitation upon the power of the railroad companies to fix the price at which they would carry passengers and freight.* It was strenuously denied, and very confidently, by all the railroad companies that any legislative body whatever had a right to limit the tolls and charges to be made by the carrying companies for transportation. And the great question to be decided, and which was decided, and which was argued in all those cases, was the right of the State within which a railroad company did business to regulate or limit the amount of any of these traffic charges."

"The importance of that question overshadowed all others, and the case of Munn v. Illinois was selected by the court as the most appropriate one in which to give its opinion on that subject, *because that case presented the question of a private citizen or unincorporated partnership engaged in the warehousing business in Chicago, free from any claim of right or contract, under an act of incorporation of any State whatever, and free from the question of continuous transportation through several States.* And in that case the court was presented with the question, *which it decided, whether any one engaged in a public business, in which all the public had a right to require his service, could be regulated by acts of the Legislature in the exercise of this public function and public duty, so far as to limit the amount of charges that should be made for such services.*"

That there can be no mistake that this court intended to decide in the Munn and other cases referred to the general proposition that an elevator or warehouse company, whether owned by a private citizen or an unincorporated partnership, "free from any claim of right or contract under an act of incorporation of any State whatever," conducts such a business as is affected with a public interest as can be regulated by the Legislature of a State, and, therefore, that such a law is not inimical to the fourteenth amendment of the Constitution, is further evidenced by the opinion of this court, delivered by Mr. Justice Gray in the case of Dow v. Beidelman (125 U. S., 686). In this opinion the learned justice says: "The general rule of law that governs

this case has been clearly stated and developed in opinions of this court delivered by the late chief justice." Reference is then made to the Munn case, and particular attention called to the opinion of the chief justice, that it was within the power of the Legislature of a State in regard to the charges or compensation for services of carriers, or other persons exercising a public employment, "to declare what shall be a reasonable compensation for such services, or, perhaps, more properly speaking, to *fix a maximum beyond which any charge made would be unreasonable.*" And, further, "to limit the rate of charges for services rendered in a public employment, or for the use of property in which the public has an interest is only changing a regulation which existed before. It establishes no new principle in the law, but only gives effect to an old one."

Mr. Justice Gray, in this opinion, further called attention to other cases decided at the same time, in the first of which Peik v. Chicago and Northwestern Railway (94 U. S., 178), the chief justice in answering "*the claim that the courts must decide what is reasonable, and not the Legislature*" said: "*Where property has been clothed with a public interest the Legislature may fix a limit to that which in law shall be reasonable for its use. This limits the courts as well as the people. If it has been improperly fixed the legislature, not the courts, must be appealed to for the change.*"

And so in the case of Georgia Banking Company v. Smith (128 U. S., 179). This court, by Mr. Justice Field delivering the opinion, says: "It has been adjudged by this court in numerous instances that the Legislature of

a State has the power to prescribe the charges of a railroad company for the carriage of persons and merchandise within its limits in the absence of any provision in the charter of the company constituting a contract vesting in it authority over those matters, subject to the limitation that the carriage is not required without reward or upon conditions amounting to taking of property for public use without just compensation; and that what is done does not amount to a regulation of foreign or interstate commerce." (Citing Stone v. Farmers' Loan and Trust Company, 116 U. S., 307; Dow v. Beidleman, *supra.*) And the learned justice further said that where property is affected with a public use "the business in which it is used is subject to legislative control. So long as the use continues the power of regulation remains and the regulation may extend * * * to prevent extortion by unreasonable charges and favoritism by unjust discrimination. This is not a new doctrine, but an old doctrine always asserted whenever property or business is, by reason of special privileges received from the government the better to secure the purposes to which the property is dedicated or devoted, affected with a public use. There have been differences of opinion among the judges of this court in some cases, as to the circumstances or conditions under which some kinds of property or business may be properly held to be thus affected, as in Munn v. Illinois, 94 U. S., 113, 146; *but none as to the doctrine that when such use exists the business becomes subject to legislative control in all respects necessary to protect the public against danger, injustice and oppression.*"

To the cases already cited may be added the Town of Burlington v. Beasley (94 U. S., 310); and Head v. Amoskeag Manufacturing Company (113 U. S., 19).

And now, in conclusion upon this branch of the subject, admitting, as claimed by Mr. Justice Field, in Georgia Banking Company v. Smith (*supra*), that there have been differences of opinion as in Munn v. Illinois, as to the circumstances or conditions under which certain kinds of property or business may be held to be affected with a public use, will it be claimed here by the counsel for the plaintiff in error, notwithstanding this court has determined in any given case either of the questions above indicated by a majority of the court, as appears by their votes and opinions, that such questions are still open and that the principle of *stare decisis* can never apply?

In view of the repeated expressions of the judges of this court as to what was, in fact, decided in the Munn case, we refuse to believe that there has yet been any intention upon the part of this court to overturn so much of the doctrines and principles of that case as we have seen admittedly were intended to be determined. And this notwithstanding the fear of Mr. Justice Bradley, as expressed in his dissenting opinion in Chicago Railway Company v. Minnesota (134 U. S., 461). Upon the contrary, we think we have the right to believe that when this court intends to deliberately overthrow the doctrine of the Munn case in the regard mentioned that it will do so in language that will leave no question of uncertainty as to the intention of the court.

## III.

It is claimed by the People that there can be no possible distinction favorable to the plaintiffs in error between the statutes of Illinois under consideration in the Munn case and the statute in question here; nor as to the property affected or as to the character of the ownership of the same.

But it will be claimed by the plaintiff's in error here, as it was in the Court of Appeals, which argument found expression to some extent in the dissenting opinion of Justice Peckham, that the legislation under consideration was not only vicious, but communistic. That it is ephemeral in its nature and that it can never have any real virtue in altering the general laws of trade, while, on the other hand, it may ruin or very greatly impair the value of the property of wholly innocent persons. But to this it may be answered what was said by this court in Powell v. Pennsylvania (127 U. S., 686), in reference to a statute of that State: "If all that can be said of this legislation is that it is unwise or unnecessarily oppressive to those manufacturing or selling wholesome oleomargarine as an article of food, their appeal must be to the Legislature or to the ballot-box, not to the judiciary. The latter cannot interfere without usurping powers committed to another department of government."

"It is argued in behalf of the defendant that if the statute in question is sustained as a valid exercise of legislative power, then nothing stands in the way of the destruction by the legislative department of the constitutional guarantees of liberty and property.

But the possibility of the abuse of legislative power does not disprove its existence. That possibility exists even in reference to powers that are conceded to exist."

In view of the attack made upon this law, it may not be inappropriate to ask here why was it enacted and what abuses did it seek to remedy. "The circumstances which led to the enactment of a statute may sometimes be considered in aid of the interpretation."

People v. N. Y. and N. B. R. R., 84 N. Y., 568.

And so courts in construing a statute may, with propriety, recur to the history of the times when it was passed; this is frequently necessary in order to ascertain the reason as well as the meaning of particular provisions in it."

U. S. v. U. Pac. R. R. Co., 91 U. S., 79.

If, within the principles of these cases, for the better understanding of the language used and the object the law-makers had in view, we may look to the public documents and records of the Legislature, we can easily ascertain the reasons for and the policy which dictated the act in question.

As early as 1875, a sub-committee on canals made a report to the Senate of the State of New York, upon testimony taken before it, in which the committee used the following language:

"In conclusion, your committee report that the terminal charges at Buffalo and New York are and have been unreasonably high, and, as a result, new and competing routes have been opened, the commerce of

the canals crippled, and the interests of the carriers seriously injured."

"These evils, if not checked, threaten the destruction of the canals and the commerce of the State. It will be difficult for the commercial men to demonstrate that there is any valid reason for their charging quite eight cents per bushel on wheat, terminal charges, while the State imposes a tax of only three cents per bushel for its transport through 353 miles of its canal, from Buffalo to the Hudson river. If boatmen are to prosper, if the products of the west are to seek an outlet through the State of New York, and New York retain its commercial supremacy, these terminal charges must be materially reduced. This Legislature should second any proposition that will consummate these results. But the commercial men of New York and Buffalo should join hands in this worthy enterprise, and reduce their heavy tax on the commerce of the canals. Until they do this, the evils pointed out will continue, and result ultimately in the destruction of the commerce of the State."

Senate Doc., 1875, vol. 6, No. 89.

In 1881, the committee on canals of the Assembly made a report to the Legislature after taking a large amount of testimony, that, among other things, "at Buffalo there was an elevating association which perpetuated itself, according to its terms of contract, every five years This association fixes rates of charges for elevating grain, pooling their earnings and dividing according to the number of shares and credited to each elevator when it entered the organization.

"A committee is usually appointed to estimate the value of an elevator, and upon that valuation the owner either runs in or out of the association. Each elevator must be in readiness to work when called upon by the managers of the organization. The working elevator receives one-eight per cent a bushel for all they handle as compensation for running expenses; the balance of earnings goes into the pool, and from this pool each elevator receives its share. There are several floating elevators, without storage capacity, which also went into the association and receive their share from the pool, though lying idle often throughout the season. * * *

"A review of the testimony herewith reported may warrant the assertion that some State control should be exercised over the operations of associations of this character. * *. *

"If elevators, located at terminal points like New York, Buffalo and Oswego, conduct their business in a way that tends to drive commerce into other channels and thereby inflict loss on the State at large, it would seem an act of wisdom to restrain such operations by legislative enactments."

See Assembly Documents, vol. 8, 1881, No. 114.

Again, in 1882, a committee of the Senate examined a large number of witnesses upon the subject, among other things, of the operation of the Western Elevating Company of Buffalo, showing the rates then charged, and the relative cost of elevating grain.

See Senate Docs., 1883, vol. 5, p. 314.

But, in addition to this, the records and reports of the Court of Appeals show some of the operations of the elevator pool at Buffalo, and its effect upon the commerce of the State.

See People v. Horton, 64 N. Y., 59;
Id., 617.

This was an action brought against the defendants to restrain them from using a floating elevator for the purpose of transferring cargoes of grain from one vessel to another. (The facts appear more fully in 5 Hun, 516.)

Allen, J., in delivering the opinion of the Court of Appeals (*supra* 617), says:

"It is very evident that the use of the elevator is not prejudicial to the public interests or to the commerce of the city of Buffalo, or of the State.

"It is possible that it may interfere with the profits of a few, having rival elevators upon land, who, it would seem, not only combined for a higher tariff of charges for services of the same character as those rendered by means of the floating elevator than was exacted by the defendants, thus more heavily taxing commerce, but also to instigate and prosecute this action. * * * The large quantities of grain brought in lake vessels to that port, and destined to an eastern market, are necessarily transferred to canal-boats and barges, and any instrumentality by which such transfer can be effected with despatch and low rates for the service is an aid, rather than a hindrance, to the commerce of the canal."

As was said by Earl, J., in People v. Arensberg (103 N. Y., 398), in reference to the Congressional

Oleomargarine bill: "If these facts are not so notorious, in view of the many acts of the Legislature and the action of Congress, the debates in public bodies and of the discussion in public prints and in other places, that we may assume judicially to know them, *we cannot assume that they are not true, or that the legislators did not know them when they framed this legislation to protect the people against the deception.*"

## V.

To summarize, we have this case presented: The People of the State of New York are the owners of a great water highway, extending from Lake Erie to the Hudson, and connecting with it, and which, for the benefit of the commerce of the State, by an amendment to the organic law, they have made absolutely free and have provided how it shall be so forever maintained.

Through its channels during the year 1888, went from Buffalo to New York, as appears from the report of the Superintendent of Public Works, nearly forty million of bushels of grain.

And the people are now confronted with this condition: The elevators and warehouses referred to in the law of 1888, located at the termini of this highway, occupy nearly every available spot or place in the harbors of Buffalo, New York and Brooklyn, which harbors are also maintained at public expense; and in the case of the "Floating Elevators" actually occupy the waters of the State, and the owners of those elevators and warehouses, in the language of the counsel for the defendant in the Munn case, "standing in the very

gateways of commerce," by combinations and trusts, through their unions and boards of trade, by fixing arbitrary rates and other monopolistic devices, have evidently determined to levy a tribute upon commerce and trade and take to themselves that very tariff which the State, as we have seen, had, in the interest of commerce, so generously released.

If, under these circumstances, in the exercise of its police power, the State cannot pass a valid law or regulation prescribing what shall be reasonable charges in the use of this kind of property, so vital and necessary to the preservation of its public interests and commercial supremacy, we must necessarily conclude that, by the insertion of a clause in the Constitution, intended to guard and protect the property rights of the *individual citizen*, the people have thereby surrendered a part of *their own sovereignty* and lost the right to protect public property and public interests. It would seem as if the bare statement of the proposition furnishes all the argument necessary to a refutation of such a doctrine.

If this law had been directed to corporations only, no one would have claimed it to be unconstitutional. And yet, under the circumstances here presented, to deny the same power to the Legslature of fixing charges for the use of property, when the business is owned and carried on by an individual performing precisely the same duties, conducting precisely the same business, and occupying precisely the same relations to the public, is illogical and indefensible. The State can prevent monopolies and extortion on the part of individuals occupying the relations that these

defendants do to the public, as well as upon the part of corporations. The power to do so in each case rests upon the same principle.

The acts and things against which the Legislature aimed were in restraint of trade and commerce, and had a tendency to prevent wholesome competition, and within the principle of the common law, were against public policy, thereby clearly presenting a condition where the Legislature was authorized to act as it did.

The Canada Pacific Telegraph Co. v. Baltimore and Ohio Telegraph Co., 66 Md., 399.
Hooker v. Vandewater, 4 Denio, 353.
Stanton v. Allen, 5 Denio, 434.
Arnot v. The Pittston and E. C. Co., 68 N. Y., 558.
Charles River Bridge v. Warren Bridge, 11 Peters, 567.
Marsh et al. v. Russell, 66 N. Y., 293.

## VI.

The only question remaining that needs to be considered here is the one whether this statute of 1888 is in violation of the powers of Congress to regulate commerce. It is, indeed, difficult to see how a statute intended to limit charges for the use of property, and which the plaintiffs in error of course contend will have that effect, can properly be held to be an interference with the freedom of transportation between the States secured by the Federal Constitution to Congress. It is possible, however, that under the general terms of the petitions for writs of *habeas corpus* in these cases, that

it will be urged by counsel that the statute of 1888 is inimical to the commerce clause of the Constitution.

Again, we may, on this question, refer to the case of Munn v. Illinois. The chief justice in discussing this question said: "It was very properly said in the case of the State Tax on Railway Gross Receipts (15 Wall., 293), that 'it is not everything that affects commerce that amounts to a regulation of it, within the meaning of the Constitution.' The warehouses of these plaintiffs in error are situated and their business carried on exclusively within the limits of the State of Illinois. They are used as instruments by those engaged in State as well as those engaged in interstate commerce, but they are no more necessarily a part of commerce itself than the dray or the cart by which, but for them, grain would be transferred from one railroad station to another. Incidentally they may become connected with interstate commerce, but not necessarily so. Their regulation is a thing of domestic concern, and, certainly, until Congress acts in reference to their interstate relations, the State may exercise all the powers of government over them, even though, in so doing, it may indirectly operate upon commerce outside its immediate jurisdiction."

It is believed that the doctrine of this case is supported and sustained by the following cases decided by this court: Pound v. Turck (95 U. S., 459); County of Mobile v. Kimball (102 U. S., 691); Escanaba County v. Chicago (107 U. S., 678); Transportation Company v. Parkersburg (107 U. S., 691); Brown v. Houston (114 U. S., 622; Morgan v. Louisiana Board of Health

(118 U. S., 455); Louisville Railway Company v. Mississippi (133 U. S., 591). Mr. Justice Brewer, delivering the opinion of the court in the last case cited, said: "In this case the Supreme Court of Mississippi held that the statute applied solely to commerce within the State; and that construction being the construction of the statute of the State by its highest court, must be accepted as conclusive here. If it be a matter respecting wholly commerce within a State, and not interfering with commerce between the States, then, obviously, there is no violation of the commerce clause of the Federal Constitution. Counsel for plaintiff in error strenously insists that it does affect and regulate interstate commerce, but this contention cannot be sustained."

See, also, Leisy v. Hardin, 135 U. S., 120.

## VII.

Within the principle of the foregoing cases it is confidently contended here that the statute of the State of New York, under consideration, cannot be held to be in violation of any provision of the Federal Constitution, and having been sustained, after a full and thorough discussion, by the highest court of the State, the judgment of that court should be affirmed.

CHARLES F. TABOR, *Att'y-Gen'l,*
*Attorney for the People of the State of New York.*

FILED.
NOV 3 1891
JAMES H. MCKENNEY.

OCTOBER TERM. 1891.

# SUPREME COURT OF THE UNITED STATES.

**ERROR TO SUPREME COURT OF NEW YORK.**

No. 644.

THE PEOPLE OF THE STATE OF NEW YORK EX REL. EDWARD ANNAN,
*Plaintiff in Error,*

*against*

ANDREW WALSH, POLICE JUSTICE OF THE CITY OF BROOKLYN, AND CLARK D. RHINEHART, SHERIFF OF THE COUNTY OF KINGS,
*Defendants in Error.*

No. 645.

THE PEOPLE OF THE STATE OF NEW YORK EX REL. FRANCIS E. PINTO,
*Plaintiff in Error,*

*against*

ANDREW WALSH, POLICE JUSTICE OF THE CITY OF BROOKLYN, AND CLARK D. RHINEHART, SHERIFF OF THE COUNTY OF KINGS,
*Defendants in Error.*

# BRIEF FOR DEFENDANTS IN ERROR.

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No. 45 BROADWAY,
New York City.

C. G. Burgoyne, Walker and Centre Sts., New York.

# Supreme Court of the United States.

OCTOBER TERM, 1891.

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| THE PEOPLE OF THE STATE OF NEW YORK EX REL. EDWARD ANNAN, Plaintiff in Error, vs. ANDREW WALSH, Police Justice of the City of Brooklyn, and CLARK D. RHINEHART, Sheriff of the County of Kings, Defendants in Error. | No. 644. |
| THE PEOPLE OF THE STATE OF NEW YORK EX REL. FRANCIS E. PINTO, Plaintiff in Error, vs. ANDREW WALSH, Police Justice of the City of Brooklyn, and CLARK D. RHINEHART, Sheriff of the County of Kings, Defendants in Error. | No. 645. |

## Brief for Defendants' in Error.

Chapter 581 of the Laws of 1888 of the State of New York took effect June 9th, 1888.

## CHAPTER 581.

AN ACT to regulate the fees and charges for elevating, trimming, receiving, weighing and discharging grain by means of floating and stationary elevators and warehouses in this State.

Approved by the Governor June 9, 1888.

Passed, three-fifths being present.

*The People of the State of New York, represented in Senate and Assembly, do enact as follows:*

SECTION 1. The maximum charge for elevating, receiving, weighing and discharging grain by means of floating and stationary elevators and warehouses in this State shall not exceed the following rates, namely: For elevating, receiving, weighing and discharging grain, five-eighths of one cent. a bushel. In a process of handling grain by means of floating and stationary elevators, the lake vessels or propellers, the ocean vessels or steamships and canal boats, shall only be required to pay the actual cost of trimming or shoveling to the leg of the elevator when unloading, and trimming cargo when loading.

SECTION 2. Any person or persons violating the provisions of this act shall, upon conviction thereof, be adjudged guilty of a misdemeanor, and be punished by a fine of not less than two hundred and fifty dollars and costs thereof.

SECTION 3. Any person injured by the violation of the provisions of this act may sue for and recover any damages he may sustain against any person or persons violating said provisions.

SECTION 4. This act shall not apply to any village, town or city having less than one hundred and thirty thousand population.

SECTION 5. This act shall take effect immediately.

*Plaintiffs in error admit the rates exacted exceeded the limit set by the provisions of the foregoing act.*

The plaintiffs Annan and Pinto are owners and lessees of grain elevators. They admit that the rates exacted for elevating grain, as charged in this case, exceeded the limit set by the provisions of the foregoing act, and allege in defense that the act is unconstitutional.

The question to be determined is, therefore, can the Legislature of the State of New York, under the limitations upon the legislative powers imposed by the Constitutions of the State and of the United States, fix by law a maxium rate of charges for elevating, receiving, weighing and discharging grain by means of floating and stationary elevators and warehouses, in any village, town or city of not less than one hundred and thirty thousand inhabitants, and, in the process of handling grain by means of floating and stationary elevators, regulate, in the case of lake vessels or propellors, ocean vessels or steamships and canalboats, the charges they shall be required to pay?

*More particularly: Does this law contravene Art. I., Sec. 6, of the Constitution of the State of New York, which provides that no person shall be deprived of life, liberty or property without due process of law, or Art. 14, Sec. 1, of the Constitution of the United States, which provides that no State shall deprive any person of life, liberty or property without due process of law,* or Section 8, Sub. 3, which provides that the Congress shall have power "to regulate commerce with foreign nations, and among the several States, and with the Indian tribes."

Before entering into the discussion of the main questions, it may be observed:

First, that "of the propriety of legislative interference within the scope of legislative power, the Legislature is the exclusive judge." Hence, if there were a

question in this case as to the adequacy of the maximum rate fixed by this law (which is denied), or if, for any other reason, the enforcement of this law would seem to work a hardship, which is not established by the record, the remedy must be sought at the polls and not in the courts. For protection against abuses by Legislatures, if there be any, the people must resort to the polls, not to the courts.

Secondly, every statute is presumed to be constitutional. The Courts will not declare one to be unconstitutional unless it is clearly so. If there is doubt, the expressed will of the Legislature will be sustained.

Munn vs. Illinois, 94 U. S., 123.

*Some of the principles of law invoked to sustain the constitutionality of this act:*

FIRST. "When private property is affected with a public interest it ceases to be *juris privati* only." Since the time of Lord Chief-Justice HALE this has been accepted without objection as an essential element in the law of property. When private property is used in a manner to make it of public consequence and affect the community at large, it becomes clothed with a public interest, and must submit to be controlled by the public for the common good.

SECOND. While it is generally true that every man may fix what price he pleases upon his own property, or the use of it, nevertheless, if for a particular purpose the public have a right to resort to his premises and make use of them, and he have a monopoly in them for that purpose, if he will take the benefit of the monopoly, he must, as an equivalent, perform the duty attached to it on reasonable terms.

THIRD. Whenever some right or privilege or benefit is conferred by the government or municipality upon

the owner, which he can use in connection with his property, *or by means of which the use of his property is rendered more valuable to him*, or he thereby enjoys an advantage over others, then the compensation to be received by him becomes a legitimate matter of regulation. Submission to the regulation of compensation in such cases is an implied condition of the grant or gift, and the State, in exercising its power of prescribing the compensation, only determines the conditions upon which its concessions or benefits shall be enjoyed. When the privilege or benefit ends, the power of regulation ceases. The State in such cases exercises no greater right than an individual may exercise over the use of his own property when leased or loaned to others. The conditions upon which the privilege or benefit shall be enjoyed being stated or implied in the legislation authorizing the grant or gift, no right is of course impaired by their enforcement. The recipient of the privilege or benefit in effect stipulates to comply with the conditions. It matters not how limited the privilege or benefit conferred, its acceptance implies an assent to the regulation of its use and the compensation for it.

FOURTH. It is now clearly established to be a principle of the common law that where a person, either natural or artificial, engages or uses his property in the public employment a public interest is created in the business, and it becomes subject to supervision and control, to a certain extent, by the State, on the grounds of public policy. The soundness of this principle has been amply demonstrated by experience, and the tendency of the courts has been and is to expand it and to extend its operation to new situations and necessities growing out of the development of modern life. And it has been applied by courts to telephones and telegraphs and railroads and grain storehouses and elevators and common carriers, on the ground that they

were *quasi* public characters and are therefore subject to State control.

Under the above-stated principles, it follows: If the business of elevating grain in the State of New York, in towns or cities of not less than 130,000 inhabitants, is affected with a public interest, or if, in the conduct of elevating grain, the owners have a monopoly of the business and take the benefit thereof, or if any special right or privilege is conferred upon the business of elevating grain by the State, by reason of which it is rendered more valuable, or if the business is of *quasi* public character, then, in either or in any one of the above cases, the business of elevating grain is subject to control and regulation by law, and such control and regulation by law, under the decisions of the Courts, do not contravene Article 1, Section 6, of the Constitution of the State of New York or Article 14, Section 1, of the Constitution of the United States.

Under these doctrines, it is urged:

FIRST. *The business of elevating grain is affected with a public interest.*

This act to regulate the charges for elevating, trimming, receiving, weighing and discharging grain by means of floating elevators and warehouses in the State of New York, wholly applies to grain shipped at Buffalo from lake vessels and storehouses into canal boats and transported therein through the Erie Canal and the Hudson River to New York, and there discharged into storehouses or ocean vessels. This is conceded. In the process of loading and discharging, the floating elevator is moored between the vessel discharging and the one loading, and the grain is transferred from one to the other while afloat. In case of stationary elevators the leg of the elevator is placed in the vessel discharging or loading, and the grain is carried up into the storehouse, or, in case of loading, spouted down

into the vessel. *In every case the elevation takes place upon the waters of the State, and all the grain that is elevated, passes through the Erie Canal and Hudson River.* The business of elevating grain which is affected by this act has been, therefore, created and is wholly maintained by the transportation of grain through the Erie Canal. In other words, the business of elevating grain, which the foregoing act regulates, is a business which is wholly dependent upon the maintenance of the Erie Canal.

The statistics reported by the Committee on Canal Transportation of the New York Board of Trade, in February, 1888, show that the receipts of grain at New York in the year 1887, by way of the Erie Canal during the seven months of navigation, to wit, from May to November, inclusive, was 46,009,200 bushels. That during the same period there was received at New York, by rail and by river and coastwise, 28,554,309 bushels. The above figures show that during the season of navigation in 1887 the canal delivered at New York 17,805,038 bushels more than all the railroads having their terminii at the port of New York, and 17,454,891 bushels more than all other routes combined, or 61 7/10 per cent. of all grain brought to New York during said months. During the year 1887 there were received at Philadelphia 17,671,031 bushels of grain; at Baltimore 24,074,804 bushels, and at Boston 17,057,062 bushels, thereby making at these three ports a total of 58,802,897 bushels of grain. That is, the receipts by canal at the port of New York during the seven months of navigation exceeded the aggregate received at Philadelphia and Baltimore for the entire year by 4,263,365 bushels, and are only 12,793,697 bushels less in seven months than the total amount received at the three ports for the entire year.

The great producing region of the West and Northwest sends its grain by water and rail to Buffalo, where it is shipped in canal boats for transportation to New

York by the Erie Canal and the Hudson River. The great quantity received in New York has made it the largest export city of the United States. This business has created a demand for means by which the immense quantity of grain coming to Buffalo and thence to New York by way of the canal can be transferred by elevators from lake vessels into canal boats and from canal boats to storehouses or vessels, and in this way the largest traffic between the citizens of the country, North and West, and the citizens of the State of New York, in the exportation of grain, is conducted, and all such grain must pass through the elevators at the Cities of Buffalo and New York. In this way trade in grain is carried on between the inhabitants of one-third of all the States in the Union.

To foster and sustain this transportation business by water in the State of New York, upon which the business of elevating grain depends, the State of New York built the Erie Canal and expended in its construction one hundred millions of dollars, and now maintains a free canal at a cost to the people of the State of about one million dollars annually. The people of the State of New York, for the purpose of protecting the State in time of war, for the purpose of building up the commerce of the State and for the purpose of keeping the channel of transportation of grain from the Western States within the State, by reason whereof the State of New York has become the Empire State of the Union, have expended this large sum of money, and are being constantly taxed to keep open this free highway of commerce. Hence any business which directly affects this waterway affects the public interest. It is further to be borne in mind that should the cost of transportation through the canals of the State of New York exceed the cost by other routes, even to the extent of one-eighth cent per bushel, it would be sufficient to force the business of transportation outside of the

the State and outside the United States in many instances.

No better evidence can be produced on this point than the evidence of Mr. Annan, one of the plaintiffs in error in this case, who is at the head of the largest elevator association in New York, and who testified in 1881 before the Senate Committee, then investigating the subject of canal tolls, as follows: "Q. What would be the effect of retaining the tolls? A. It would drive the trade to other places. Q. Why would it? A. They cannot afford to pay the tolls at the present rate and get a cent out of it; there is nothing in it. Q. Suppose the tolls were removed, can New York, in your judgment, retain that trade? A. Yes. Q. Do you think a cent a bushel toll is sufficient to drive the business away? A. I think one-eighth cent would drive it away. One-eighth cent would turn grain from Baltimore or any other port. Q. Suppose New York gives up the canal, can New York retain the grain trade by the railroads in competition with Boston, Baltimore, the Welland Canal and the Mississippi route? A. No, sir."

It will be seen from the foregoing facts that the case of elevating grain in the State of New York is affected with a public interest in a much more striking manner than the business of storing grain in Chicago affects the public interest, as was shown in the case of Munn vs. Illinois. In that case, the learned Chief Justice WAITE concluded that the business of storing grain in Chicago affected the public interests, because: "The great producing region of the West and Northwest sends its grain by water and rail to Chicago, where the greater part of it is shipped by vessels for transportation to the seaboard by the Great Lakes, and some of it is forwarded by railway to the eastern ports. Vessels to some extent are loaded in the Chicago harbor and sail through the St. Lawrence directly to Europe. The quantity of grain received in Chicago has made it the greatest grain market in the world. This business has created a de-

mand for means by which the great quantity of grain can be handled or stored, and these have been found in grain warehouses, which are commonly called elevators, because the grain is elevated from the car by machinery operated by steam into the bins prepared for its reception, and elevated from the bins by a like process into the vessel or car which is to carry it on. In this way the largest traffic between the citizens of the country north and west of Chicago, and the citizens of the country lying on the Atlantic coast, north of Washington, is in grain which passes through the elevators of Chicago. In this way the trade in grain is carried on by the inhabitants of seven or eight of the great States of the West, with four or five of the States lying on the seashore, and forms the largest part of the interstate commerce in these States. The grain warehouses or elevators in Chicago are immense structures, holding from 300,000 to 1,000,000 bushels at one time, according to size. They are divided into bins of large capacity and great strength. They are located with the river harbor on the one side and the railway tracks on the other, and the grain is run through them from car to vessel or boat to car, as may be demanded in the course of business. It has been found impossible to preserve each owner's grain separate, and this has given rise to system of inspection and grading, by which the grain of different owners is mixed, and receipts issued for the number of bushels, which are negotiable and redeemable in like kind, upon demand. This mode of conducting the business was inaugurated more than twenty years ago, and has grown to immense proportions. The railways have found it impracticable to own such elevators, and public policy forbids the transaction of such business by the carrier; *the ownership has, therefore, been by private individuals,* who have embarked their capital and devoted their industry to such business as a private pursuit."

This shows how closely the business of elevating and storing grain is allied in their interest to the public.

But in addition to the above reasons, which apply equally as well to the business of elevating grain as to storing it, set forth by the learned Chief Justice WAITE, upon which he predicts a public interest, we have in this case a business which directly affects the greatest internal water-way in this nation, which is made free to all by a direct tax upon the people of the State of New York. This great water-way is not only of the first importance to the State of New York and the people of the Western States as a cheap public highway; but it is of the utmost importance to the State as a check on railway corporations, preventing them, by legitimate competition, from exacting exorbitant rates of freight.

Under the principles of law above set forth, there can be no doubt as to the fact that the business of elevating grain, as it directly affects the usefulness of this water-way, is affected with a public interest. In fact, it is difficult to see how a stronger illustration could be drawn of a business affected with a public interest than the facts in this case show. The business of elevating grain in the State of New York has become a very large branch of industry and more closely affects the public interest than the storing of the grain, and when the price for any reason becomes exorbitant for elevating and weighing grain, the people at once feel its effects.

It is clear that the business of elevating grain in the State of New York is affected with public interest because: First, men engaged in the business of elevating grain can, if not subject to the control of law, fix a price which would destroy the usefulness of the Erie Canal, which has been built by the people of the State of New York at a cost of $100,000,000, and is kept open and free to all who wish to use it by a direct tax upon the people of the State of over one million dollars a year. Second, by demanding an unreasonable charge

for the services performed by men engaged in elevating grain can practically annihilate all the capital invested in boat and vessel property employed in the grain trade in the State of New York. Third, because the men engaged in the elevation of grain can, by combining, practically take away from the grain producers of the great grain States of the West and Northwest the usefulness of the Erie Canal, the only highway which they have to compete with the great trunk railroad lines to the seaboard, thereby preventing those lines from becoming monopolies and charging exorbitant rates of freight. The chain of lakes, with the Erie Canal and the Hudson River, constitute a great free waterway, to which the people of the United States have free access and upon which every individual may transport his products free from the exorbitant demands of the grasping officials of railroad monopolies and trusts. The people who maintain this free highway, not only for the purpose of commerce and trade and building up the State, but for the protection of the State and country in time of war, must have a right to make such laws and regulations as will prevent individuals and monopolists from jeopardizing its usefulness.

So far back as 1817, the people of the State of New York showed how fully they appreciated their interest in the construction of the Erie Canal. The Legislature of the State, in the preamble of the originating act of 1817, gives as reasons for the great undertaking: "It will promote agriculture, manufactures and commerce, mitigate the calamities of war and enhance the blessings of peace, consolidate the Union, and advance the prosperity and elevate the character of the United States." The subsequent growth, development and commercial pre-eminence of the State proves the profound wisdom of the promoters of this great water-way. Can it be said, therefore, that the public is not interested in the regulation of any business which directly affects the usefulness and perpetuity of this public water-way?

The courts of the State have declared in emphatic terms the interest the people of the State have in any business that concerns the canals. "As the canals are the property of the State, constructed at great expense, as facilities to trade and commerce, and to foster and encourage agriculture, and are at the same time a munificent source of revenue, whatever concerns their employment and usefulness deeply involves the interests of the whole State."

5 Denio, 441.

SECOND. *The business of elevating grain is an actual monopoly.*

Not only is the elevation of grain in the State of New York affected with public interest, but the business of elevating grain in the State of New York has become an actual monopoly. It is only necessary to refer to the record in this case, which, to say the least, is very incomplete, to become satisfied on this point. The record shows that thirty-one floating elevators in the City of New York are controlled by six firms, and it is susceptible of proof, although it has not been brought out in the record, that the grain receivers in the City of New York are largely the owners of the elevators, and, therefore, entirely control the manner and price of elevating grain. Moreover, it will be observed that the price fixed for elevating grain has been fixed by what is termed a Committee of Grain Men in the Produce Exchange, but on an examination of the evidence in the record it will be observed that no member of that committee represents the interests of the boatmen, who pay for the elevation of the grain. It further appears that in no instance has the owner of the boat had a voice in fixing the cost of elevation or of electing or selecting who shall elevate the grain.

By referring to Exhibit No. 2 (fols. 25, 26, 27) it will be seen that the special committee who fixed the rate of charges is a committee of elevator and warehouse

men. There is no member of this committee representing the interests of the boatmen. The testimony of Edward Annan (fols. 18, 19, 20) shows that the grain committee of the Produce Exchange fixes the schedule of prices for elevating grain by floating and stationary elevators, and that only such elevators as are licensed by the Produce Exchange can give warehouse receipts which are considered regular. Those warehouse receipts are the medium for transacting grain business on the Produce Exchange, and under Rule 5, Section 1, of the Rules of the Grain Trade (fols. 28, 29), established by the New York Produce Exchange, no warehouse receipts can pass current on the floor unless the warehouse is licensed by the Exchange and the owners thereof members of the Exchange. By its charter the Produce Exchange claims a right to make such by-laws. In this way the rate of charges for elevating grain is fixed by a committee of grain men, who are the owners of the elevators and warehouses, and these charges cannot be altered or in any way changed, because the Produce Exchange will only license such elevators as are owned by members of the Exchange, and only the receipts of licensed elevators and warehouses can pass current on the floor of the Exchange. These facts prove conclusively that the business of elevating grain in the City of New York has become and is an absolute monopoly, controlled by a committee of owners of elevators and warehouses, and the persons who are most directly interested in the cost of elevating grain have no voice whatever in fixing the rate, or selecting the persons or parties who shall elevate the grain.

Indeed, by referring to the annual report of the New York Produce Exchange for the years 1884–5, p. 243, we find that the rates for storage (including weighing), for elevation from canal boats, for screening and blowing, for mixing grain of different grades, were fixed by a committee who signed themselves The Grain Warehouse Co., Hazeltine & Co., J. P. & G. C. Robinson,

Francis E. Pinto (one of the plaintiffs in error in this case), Woodruff & McLean, Bartlett & Greene, U. S. Warehouse Co. By referring to p. 242 of the same annual we find that the Grain Warehouse Co. means the Excelsior Stores, Clinton Wharf Stores, Commercial Wharf Stores, Finley's Stores; capacity, 3,500,000 bushels, with three elevators. That Hazeltine & Co. means Dow's Stores, Columbia Stores; capacity 3,500,000 bushels, with three elevators; and that Francis E. Pinto means Pinto's Stores; capacity 1,000,000 bushels, two elevators; and that Bartlett & Greene means E. B. Bartlett & Co., Central Elevator, Harbeck Stores, Roberts Stores, Watson Stores and Kelsey Stores; capacity 2,000,000 bushels, with three elevators; and that U. S. Warehouse Co. means Iron Elevator; capacity 400,000 bushels, with two elevators. The foregoing facts shed light upon the question of competition in the business of elevating grain in the port of New York, and upon the question of whether the business has become a monopoly. From these facts it appears that the rate for elevating grain is fixed by none other than the men directly engaged in the business of elevating and storing grain, and that they assume the right to fix this rate by reason of the By-Laws of the Produce Exchange, which is an association deriving all of its authority and power through a charter granted by a special act of the Legislature of the State of New York. If any further proof is required of the extent and nature of the monopoly of what is known as the business of elevating grain in the City of New York, it is amply furnished by the record in this case. Immediately after the passage of this bill, to wit, June 18th, 1888, a meeting of the members of the grain trade was called by Charles C. Burke, vice-president of the Produce Exchange (fols. 25, 26), and in order to avoid the effect of the bill, which fixes the price for elevating, weighing and discharging grain at five-eighths cent per bushel, added, by a resolution of

said committee, an extra charge, never before made, of one-half cent per bushel for transportation of elevator for grain afloat, and one-half cent per bushel extra storage for grain in stores. This shows how completely the business of elevating grain is controlled by the owners of the elevators, through the Produce Exchange. The fact is that the grain men in the Produce Exchange have made by-laws which exclude all elevators and warehouses from elevating and storing grain which are not owned by members of the exchange, and by a system of licensing the elevators and warehouses they make a selection such as they please. Then a committee composed of the owners of such elevators and warehouses as are licensed in the exchange fix whatever rate they please for elevating and storing grain, and thereby force the public to submit to such rates and charges. This becomes an absolute monopoly, and it has practically been so for the last ten years.

The learned counsel for the plaintiffs in error may argue that "in New York harbor it is a physical impossibility for the elevators to have a monopoly. The canal boat and the ocean steamer can go to New York City or to Brooklyn. These cities have stationary elevators, and a floating elevator can go anywhere in the harbor. That there is no limit to the power of duplicating existing elevators."

But such arguments are futile because, as above shown, no elevator and no storehouse can elevate or receive grain except they are licensed by the Produce Exchange. Not only that, but the Produce Exchange also fixes the rate for elevating and storing grain. Therefore there is no opportunity for competition. There is no opportunity for any outside capitalist to come in and do business and compete with the licensed elevators of the Produce Exchange. This, as above stated, makes an actual monopoly, which must in all cases, on principle, be as equally amenable to law as

legal monopolies. The fact is that before this law was enacted the canal-boat captain had no voice or choice in deciding who should elevate the grain, either in loading or unloading his boat, or in fixing the price therefor.

It may be further argued that there is a strong competition between the floating and stationary elevators for the business of elevating grain in New York. The above facts show that that is not the case and that there is in reality no competition, because the rate for elevating grain is fixed by the Produce Exchange, and only such elevators as the Produce Exchange may license can do the work. Besides, as hereinbefore stated, it is susceptible of proof that the grain receivers are the owners of the elevators, and the grain receivers constituted the committee of the Produce Exchange who license the elevators and fix the rate of charges. No better proof is required of this fact than the fact that, notwithstanding during the last twelve years the price for transporting grain from Buffalo to New York by way of the Erie Canal has gradually been reduced from twelve cents in 1876 to less than two cents per bushel in 1888, during the same period the price for elevating grain has been the same, and has never been reduced in any sum. This shows conclusively that there has been no such thing as competition.

The question then is, shall the men engaged in elevating grain at Buffalo and New York be permitted, by fixing an exorbitant rate for elevating grain, to take away from the people of the State of New York and of the United States the benefit of the great free highway of water from Buffalo to New York; and can it be said, when the business of elevating grain stands at the very gateway of this free highway of commerce, made free by the taxation of the people, that the people cannot constitutionally make a law which will prevent the destruction of the usefulness of this highway, and that the business of elevating grain is not affected with

public interest? The foregoing facts conclusively show that the business of elevating, weighing and discharging grain is affected with a public interest of great magnitude, and that the business of elevating grain has become and is an actual monopoly.

This monopoly exists in Buffalo as well as in New York. The learned Judge ANDREWS in his opinion (fol. 69) says: "It is asserted that a combination exists, and has for several years existed, between the elevator owners to maintain excessive charges by fixing a uniform tariff and pooling the earnings and dividing them ratably among all the the elevator owners, although but a part of the elevators are actually operated." It will be seen that by a combination in Buffalo and the laws and rules of the Produce Exchange in New York, the proprietors of grain elevators and storehouses are in a position to place a toll upon every bushel of grain that passes through the Erie Canal, and the boatmen or the people of the State of New York are powerless to prevent it, unless they can do so through the Legislature.

THIRD. *The State confers privileges and benefits upon the business of elevating grain.*

The plaintiffs' counsel will not deny that this act relates only to the elevation of grain that passes through the Erie Canal of the State of New York. Have not the people of the State of New York granted to the men engaged in the business of elevating grain advantages and benefits in the use of their private property.

The taxpayers of the State of New York, by sustaining a free canal, have made the business of elevating grain by floating and stationary elevators possible. The State has given to the common carrier a free canal, and is maintaining it by a direct tax upon the people, and the business of elevating grain into and out of the boat is made possible by the constant maintenance of

the canal by the State. Should the people of the State of New York cease to maintain the Erie Canal the business of transporting and elevating grain would be wholly destroyed. Therefore, it must be conceded that the business of elevating grain does receive support from the public, and that it is only through such support that the business can exist. It is to be remarked that no matter how trifling this support or benefit may be it is sufficient to give the State the right to regulate the business by law. But in this case the support is not trifling, but substantial. The elevation takes place in every instance upon the waters of the State.

FOURTH. *The business of elevating grain is an incident to the business of transportation and of the common carrier, and is of a quasi public character.*

The learned Judge ANDREWS in his able opinion (fols. 84, 85) most aptly puts it: "There are elements of publicity in the business of elevating grain which peculiarly affect it with a public interest. They are found in the nature and extent of the business, its relation to the commerce of the State and country, and the practical monopoly enjoyed by those engaged in it. The extent of the business is shown by the facts to which we have referred. A large proportion of the surplus cereals of the country passes through the elevators at Buffalo and finds its way through the Erie Canal and Hudson River to the seaboard at New York, from whence they are distributed to the markets of the world. *The business of elevating grain is an incident to the business of transportation. The elevators are indispensable instrumentalities in the business of the common carrier. It is scarcely too much to say that in a broad sense the elevators perform the work of carriers. They are located upon or adjacent to the waters of the State and transfer from the lake vessels to the canalboats or from the canalboats to the ocean vessels the cargoes of grain, and thereby perform an essential service in*

*transportation. It is by means of the elevators that transportation of grain by water from the upper lakes to the seaboard is rendered possible. It needs no argument to show that the business of elevating grain has a vital relation to commerce in one of its most important aspects.* Every excessive charge made in the course of the transportation of grain is a tax on commerce, and the public have a deep interest that no exorbitant charges shall be exacted at any point upon the business of transportation. The State of New York, in the construction of the Erie Canal, exhibited its profound appreciation of the public interest involved in the encouragement of commerce."

This brings out clearly the important fact that the Legislature, by regulating the price of elevating grain under the terms of this act, is simply regulating the rates incidental to the business of the common carrier, and those carriers who conduct their business upon the waterways owned and sustained by the State. It will not be denied that this is within the powers of the Legislature. The control which by common law and by statute is exercised over common carriers is conclusive upon this point, and further shows that the right of the Legislature to regulate charges for services in connection with the use of property *does not in every case depend upon the question of legal monopoly.* The State gives no protection to the common carrier other than that which it affords to all persons and property within its jurisdiction. The justification for this statute to regulate the charges for elevating grain is found under the principle of the common law so ably stated by Lord HALE. When private property is affected with a public interest, it ceases to be private property only. The facts show in this case that the business of elevating grain to which this act applies is affected with a public interest because the State at great expense has built and now maintains the waterway over which the grain is transported by vessels from which and into

which, upon such waterway, the grain is elevated. The business is made possible only by the maintenance of this waterway by the State; and the commercial supremacy of the State depends upon the maintenance of this waterway.

FIFTH. *The Produce Exchange fixed the rate of charge for elevating grain, and claims the right to do so under its charter.*

The rate of charge for elevating grain prior to this act, was fixed by a committee of grain men under the by-laws of the Produce Exchange, which derives its power through a charter from the State.

It will be admitted that the right to regulate a monopoly granted by Act of the Legislature rests upon the self-evident truth that the creator of an exclusive privilege may control and direct the manner of exercising it. The charter of the Produce Exchange has been made a part of the record in this case (fol. 19) presumably to show the right of the Produce Exchange to make by-laws to license elevators and to fix the rate of charges for elevating, weighing and discharging grain. The charter of the Produce Exchange was granted by the State, and, therefore it will not be denied that the State has a right, under the above principle, to control and direct the manner in which the Exchange shall exercise its privileges under its charter. If, therefore, the Produce Exchange, through its committee, can license elevators and can fix the rate of charges for elevating grain, it must follow that this right flows from the rights which the Produce Exchange has been granted by the State.

In fact as the record shows the plaintiffs in error have been exercising under the rules of the Produce Exchange, the right to regulate the charges for elevating grain under the authority granted by the Legislalature of the State. If the Legislature can grant the right to the Produce Exchange to fix the rate of

elevating grain, why can not the Legislature itself fix a limit to the rate.

SIXTH. *The maximum rate fixed by the act is reasonable.*

The plaintiffs' counsel may argue that the business of elevating grain has been carried on without profits to the owners of the elevators. It only requires a reference to the business of discharging cargoes of other merchandise to show that this cannot be the case. It costs in the harbor of New York to discharge coal twelve cents a ton, which for a cargo of 214 tons would amount to $25.68. It costs for discharging iron ore sixteen cents a ton, which for 214 tons would be $34.24, and it costs for discharging a cargo of lumber and piling it back, in one pile, $45. It certainly is clear that it would cost more to discharge a cargo of coal, ore or lumber than a cargo of grain, which is discharged by steam and by elevators adapted to the purpose. Notwithstanding this, the charges for discharging a cargo of grain have been, for the last ten years, about $150. This proves conclusively that the rate of five-eighths cent per bushel or $50 a cargo is an ample charge for elevating grain. Moreover the price of five-eighths cent per bushel was not fixed by the Legislature presumably until evidence had been taken, before committees especially appointed to hear evidence in behalf of the owners of elevators, to show what the actual cost of elevating grain was. It is fair to assume that the Legislature did not make the rate five-eighths cent per bushel until they had concluded a careful and thorough investigation that that was a reasonable and fair charge.

## POINTS.

### I.

### Public Interest.

The power of the Legislature to control and regulate charges for elevating grain, as embraced in the act, rests upon " the nature and extent of the business, the existence of a virtual monopoly, the benefit derived from the canal creating the business and making it possible, the interest to trade and commerce, the relation of the business to the prosperity and welfare of the the State, and the practice of legislation in analogous cases." These circumstances affect the business with a public interest, and collectively create an exceptional case and justify legislative regulation.

The reason of this power is ably given by the learned Chief-Justice WAITE in the case of

Munn vs. Illinois, 94 U. S., 124.

" When one becomes a member of society, he necessarily parts with some rights or privileges, which as an individual not affected by his relations to others, he might retain. ' A body politic,' as amply defined in the preamble of the Constitution of Massachusetts, ' is a social compact by which the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the common good.' This does not confer power upon the whole people to control rights which are purely and exclusively private ; but it does authorize the establishment of laws requiring each citizen to so conduct himself, and so use his own property as not unnecessarily to injure another. This is the very essence of government and has found expression in the maxim *sic utere tuo ut alienum non lædas.*" Under this doctrine the Govern-

ment regulates the conduct of its citizens one towards another and the manner in which each shall use his own property, *when such regulation becomes necessary for the public good.* From this source come the police powers of the State. Under these powers the State of New York now regulates ferries, common carriers, hackmen, innkeepers, pilots and wharfingers.

The doctrine upon which the courts sustain the right of the Legislature to control and regulate these branches of business is not wholly because they are or may become monopolies, nor because the Government has granted to them any special privileges, *but because they are all affected with a peculiar public interest. The peculiarity of the interest to the public lies in the fact that by reason of the condition and nature of these branches of business the public could be imposed upon if the law did not control and regulate them.*

The business of elevating grain contains the same elements of danger of imposition upon the public as the branches of business above mentioned, and in addition receives direct support from the State by reason of the construction and maintenance of the Erie Canal, and has become a monopoly. In respect to the receiving aid from the State, the cases at bar are to be distinguished from the case of Munn vs. Illinois; and in this respect the power of the Legislature to control and regulate is more pronounced and, in fact, absolute.

"If, then, by public permission, one is making use of the public property, and he chances to be the only one with whom the public can deal in respect to the use of that property, it seems entirely reasonable to say that his business is affected with a public interest which requires him to deal with the public on reasonable terms."

Cooley's Constitutional Lim. (5 Ed.), 739.

This is exactly the position of the business of elevating grain. The elevators must use the Erie Canal,

built and owned by the State, to carry on their business. By reason of the limited space at the entrance of the Erie Canal where grain is transferred, and by by reason of a combination of the owners of the elevators, at Buffalo, and the control exercised over the business of elevating grain in New York, through the rules of the Produce Exchange, it chances that the public can deal only with these combinations, hence the Legislature must have the right to regulate the charges and see that the public is dealt with on reasonable terms. Otherwise the owners of these elevators, by means of modern methods of combination, can take from the people of the State the use and benefit of this most valuable public water-way which they have built and now maintain. The people of the State, when the exigency arises, must have power to enact laws to protect and preserve the public property. Moreover, to the people, in the exercise of their legislative power, is left the right and duty of determining when the exigency has arisen which demands the exercise of that power. Whether the facts show that the business of elevating grain is affected with a public interest, that it has become a virtual monopoly and that it receives privileges from the State, are questions upon which it must be presumed the Legislature has passed, after due investigation and deliberation and before the passage of this act.

## II.

## Police Powers.

The act is constitutional as an exercise of the police power of the State.

It is idle to talk about the right of conducting busi-

ness in one's own way. There is not, and never was, in organized society any such absolute right, and the statement of the right to do business and use one's private property in one's own way is one of those very general propositions which are subject to endless exceptions and endless modifications. The exceptions and modifications are, indeed, so many as practically to make the general proposition a downright untruth. There are two maxims which, in their general scope, embrace these numerous exceptions and modifications; one of them is *Salus populi Suprema Lex;* and the other is *Sic utere tuo ut alienum non lædas* (see Broome's Legal Maxims (7th Am. Ed.), p. 1, *et seq.*, and 364, *et seq.*). By referring to Broome's Legal Maxims above cited, it will be seen that *both these maxims are as applicable to the conduct of persons and corporations as they are to the manner of use of their property,* and in fact the whole police power of the State pertains as much to the regulation of the conduct of *individuals* as to a regulation of the use of their property.

The police power of the State is in fact based upon the maxim *Sic utere tuo*, &c.

In the case of Entick vs. Carrington, 19 How. St. Tr., 1066, Lord CAMDEN said:

"The great end for which men entered into society "was to secure their property. That right is pre- "served sacred and incommunicable in all instances "where it has not been taken away or abridged by "some public law for the good of the whole. Cases "where this right of property is set aside by positive "laws are various. Distresses, executions, forfeitures, "taxes, &c., are all of this description, wherein every "man by common consent gives up that right for the "sake of justice and the general good."

But the *sine qua non* of the existence of society, and hence of private property, is the abridgment of individual rights for the public welfare.

At page 438 of his great work on Constitutional Limitations (5 Ed.) Judge COOLEY says:

"In organized society every man holds all he posses-
" ses and looks forward to all he hopes for, through the
" aid and under the protection of the laws." * * *

"The right to private property is a sacred right
" * * * but as it is a right which rests upon equities,
" it has its reasonable limits and restrictions; it must
" have some regard to the general welfare and public
" policy; it cannot be a right which is to be examined,
" settled and defended on a distinct and separate con-
" sideration of the individual case, but rather on broad
" and general grounds which embrace the welfare of
" the whole community, and which seek an equal and
" impartial protection for the interests of all."

Like principles were well expressed by the Supreme Court of Alabama, in the Mayor, &c., of Mobile vs. Yuille, 3 Ala., N. S., 139, 140; 36 Am., Dec. 441, in which an ordinance regulating weight and *price* of bread was held to be valid.

Bertholf vs. O'Reilly, 74 N. Y., 509:

On p. 521 ANDREWS, J., says: "That a statute impairs the value of property does not make it unconstitutional. All property is held subject to the power of the State to regulate or control its use, to secure the general safety and the public welfare. 'We think it is a settled principle,' says Chief-Justice SHAW, in Com. vs. Alger (7 Cush., 84), 'growing out of the nature of well-ordered civil society, that every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that his use shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the right of the community. All property is held subject to those general regulations which are necessary to the common good and general welfare."

"Judge REDFIELD, in a passage often cited with approval, speaking of the police power, says: 'By this general police power of the State, persons and property are subjected to all kinds of restraints and burdens, in order to secure the general comfort, health and prosperity of the State; of the perfect right of the Legislature to do which no question ever was, or upon acknowledged general principles can be made' (Thorpe vs. R. and B. R. R. Co., 27 Vt., 140). The police power socalled inheres in every sovereignty, and is essential to the maintenance of public order and the preservation of mutual rights from the disturbing conflicts which would arise, in the absence of any controlling, regulating authority, and has been constantly exercised by the Legislature in a great variety of cases. We need not enumerate the subjects in relation to which this power has been exercised. We shall content ourselves by referring to two cases recently decided by the Supreme Court of the United States to show how far courts have gone in upholding legislation affecting private rights and property, as a due exercise of the police power residing in the State. Those cases are the Slaughter House cases (16 Wall., 36), and Munn vs. The State of Illinois (4 Otto, 114). * * * These cases may, perhaps, be deemed to have carried the right of legislative interference with private rights and property to its utmost limit, but they illustrate the scope of the police power in legislation; and the reports abound in decisions which show that the State has authority to regulate the use and enjoyment of property and the control of private business, in many ways, 'without coming in conflict with any of those constitutional principles which are established for the protection of private rights or private property.'"

Phelps vs. Racey, 60 N. Y., 10.

On pp. 14 and 15, CHURCH, Ch. J., says: "The Legislature may pass many laws, the effect of which may

be to impair or even destroy the right of property. Private interest must yield to the public advantage. * * * It is also urged that the statute in question violates that provision of the Constitution of the United States which authorizes Congress to regulate commerce among the States. * * * But there are many powers conferred upon Congress which, until exercised by it, are regarded ar dormant and may be exercised by the States within their limits, among which is the power to regulate commerce. 'If the terms of the grant are not exclusive, and there is no express prohibition upon the States, and no repungnancy or inconsistency in its exercise by the States, the authority is concurrent' (People *ex rel.* Barlow vs. Curtis, 50 N. Y., 326). The celebrated license cases, reported in 5 Howard (U. S.), 504, contain an elaborate examination of the powers of the States under this clause of the Constitution. One of those cases involved the right of a State to require a license for the sale of a package of gin, imported from another State, as to which TANEY, Ch. J., said, 'As Congress has made no regulation on the subject the traffic in the article may be lawfully regulated by the State as soon as it is landed in its territory, and a tax imposed upon it, or a license required, or the sale altogether prohibited, according to the policy which the State may suppose to be its interest or duty to pursue.' And CATRON, J., after alluding to the exercise of power by the States, upon subjects involved in various affirmative grants to Congress, said: 'It is now too late, under existing circumstances, for this Court to say that the similar affirmative power to regulate commerce with foreign nations and among the States, shall be held an exclusive power in Congress.'"

"Laws and ordinances relating to the comfort, health, convenience, good order and general welfare of the inhabitants, known as police laws, though they may disturb the enjoyment of individual rights and make no

provision for compensation, are not on that ground unconstitutional."

Hill vs. Thompson, 48 Superior Ct. R., 481.

"A statute declaring it unlawful, within certain counties, to transport or move after sunset and before sunrise of the succeeding day any cotton in the seed, but permitting the owner or producer to remove it from the field to the place of storage, is not unconstitutional."

Davis vs. State, 44 American R., 128.

See also

Barbier vs. Connolly, 113 U. S., 27.

Soon Hing vs. Crowley, 113 U. S., 703.

"A merchant purchased a stock of pistols under a license. The privilege was repealed by an act of the Legislature after his license had expired but before his stock was exhausted. Offering to sell the balance afterward, held that he was liable to the penalties of the act."

State vs. Burgoyne, 40 American R., 60.

It may be contended that this regulation of the manner of use of property applies only to incorporated companies, who enjoy some special privilege conferred by the State, but this cannot be as already intimated. Take the case of a railway company, for instance. There is conferred upon them the right of eminent domain. It is a privilege or sovereign power of the State in the hands of a citizen or corporation. It is and always has been one of the chief functions of the Government to control and regulate communication between the people. It has always been one of the chief objects of the Government to look after roads of various kinds, but it merely does this because of the great public interests attached to roads, and all other methods of communication, and merely because it confers a certain

privilege upon private corporations, so that they may exercise these functions in the place and stead of the Government, does not alter the nature of the relations between either the corporations and the Government or the corporations and the people. *This relation and the legal obligations and duties would be precisely the same were these powers and privileges conferred upon a single individual, or a copartnership, instead of upon the corporation.* Instances are not wanting in which all the franchises and privileges usually exercised by railway corporations have been and are exercised by *single individuals.* In these cases the relation between the State and the individual and the general public is in no sense different from those that would exist if it were a corporation instead. All these matters of such general public interest, such as mills, railways, ferries, wharves, inns, telegraphs, have been controlled or regulated because of *one single essential element,* which is common to all—that is, *the great interest the public have in all occupations of a like kindred character.* Therefore, in the beginning of society government exercised the right of eminent domain as a sovereign power. It was a sovereign power, *not inherently,* but because of the great public interest and welfare it involved. The Government took control of roads and communication between citizens as being within the sovereign power, but the view was that these things were within the sovereign power *merely because of the great interests which the whole people had in them.* So that if this grain elevating business is a property which is affected with a public interest, as we contend, then the police power of the State extends just as much to this grain elevating business as it would to a railway company. The very same necessity which requires some governmental regulation of communication by means of railroads necessitates the control over the operations of a business like that of elevating grain.

The police power may be exercised either by the

Legislative, Executive or the Judicial Departments of the Government (see Cooley's Const. Lim., 5th Ed., 436). The universal ramifications of this governmental power are well set forth by Judge COOLEY in his work on Constitutional Limitations. On page 706 (5th Ed.) he says:

"The police of a State, in a comprehensive sense, "embraces its whole system of internal regulation, by "which the State seeks not only to preserve the public "order and to prevent offenses against the State, but "also to establish, for the intercourse of citizens with "citizens, those rules of good manners, and good "neighborhood, which are calculated to prevent a con-"flict of rights, and to insure to each the uninterrupted "enjoyment of his own, so far as is reasonably con-"sistent with a like enjoyment of rights by others."

As to the extent of this power, in the case of the Commonwealth vs. Alger (7 Cushing, 53, 84), Chief-Justice SHAW stated the universality of the police power —the power to regulate the conduct of persons and corporations whenever their conduct tended in any way to interfere with the equal enjoyment by others of their rights. The learned Chief-Justice said:

"We think it is a settled principle growing out of "the nature of well-ordered civil society, that every "holder of property, however absolute and unqualified "may be his title, holds it under the implied liability "that his use of it shall not be injurious to the equal "enjoyment of others having an equal right to the en-"joyment of their rights, nor injurious to the rights of "the community. All property in this commonwealth "* * * is held subject to those general regula-"tions which are necessary to the common good and "general welfare. Rights of property, like all other "social and conventional rights are subject to "such reasonable limitations in their enjoyment as "shall prevent them from being injurious, and to "such reasonable restraints and regulations established

" by law, as the Legislature, under the governing and " controlling power vested in them by the Constitu- " tion, may think necessary and expedient. This is " very different from the right of eminent domain, the " right of a government to take and appropriate pri- " vate property whenever a public exigency requires " it, which can be done on providing a reasonable com- " pensation therefor. The power we allude to is rather " the police power; the power vested in the Legislature " by the Constitution to make, ordain and establish all " manner of wholesome and reasonable laws, statutes " and ordinances either with penalties or without, not " repugnant to the Constitution, as they shall judge to " be for the good and welfare of the commonwealth. " It is much easier to perceive and realize the existence " and sources of this power than to mark its boundaries " or prescribe limits to its exercise."

It is said by Judge COOLEY in his Constitutional Limitations, page 736 (5th Ed.), that a hackman exercises a public employment in the public streets; one which affords peculiar opportunities for imposition and frauds, and requires special supervision, insomuch that it is commonly thought necessary to prohibit making himself such, except with permission of the State, and the number is sometimes limited so as in effect to give special privileges. The words "*peculiar opportunities for imposition and fraud*" are of special significance.

No language could more aptly describe the situation which the general public would be in, or the relations of the grain elevating business to the general public, than these words.

But if the common carrier is one having no privileges conferred upon him by the Government (as may be the case with many common carriers), he is still subject to governmental regulation, because he stands in a position which enables him, if he sees fit, to impose upon the public, to create a monopoly, to jeopardize property placed in his care, and there-

fore, the State, by virtue of its police power takes hold of him and his occupation, his property and his conduct, and subjects him and it to governmental regulation. Now, the relation between the public and a common carrier or innkeeper may be contractual but the relation which the common carrier holds to his property and the public is a *status*. There is a *status* existing between the general public and the common carrier, and there is a legal duty resting upon the carrier. There is also a *status* between the public and an innkeeper or a miller; between an innkeeper or a miller and his property. This *status* never changes, so long as the innkeeper or miller chooses to carry on his occupation. He may discontinue his occupation, and then the *status* would be at an end. Now, by reason of this *status*, the property of the carrier, innkeeper or miller, for instance, is affected with a public interest, or rather that *status* arises out of the public interest, and any one, upon paying reasonable compensation therefor, may demand of a carrier transportation of him or his goods.

What we are endeavoring to impress upon the mind of the Court is the fact that wherever property is affected with a public interest, wherever it is subject to Governmental control and regulation, because it directly affects others in the enjoyment of their property, it is subject to the police power of the State; that then there exists a *status* between the public and that property, between that property and its owner, between the owner and general public, and that as long as the individual or corporation sees fit to use his property in a manner which affects the public interest, this *status* must exist, and the maxim of *sic utere*, &c., would be applied and enforced by the Courts.

The question in the cases at bar, therefore, stripped of all outside elements and directly put, is this: The public good demands that the business of elevating grain in the State of New York shall be regulated by

law; where is the power to make that law? Is it in the legislative or the judiciary branch of our Government? The answer to this question must decide these cases. The answer, it is respectfully submitted, is not difficult. The judiciary is not the law-making branch of the Government. Its office is to interpret and promulgate the law. The Legislature is the law-making branch. Hence, if there is law to be made, the Legislature must make it. Whether the Legislature is wise when performing its office is not the question here. That question was passed upon at the time of the formation of our Government. Our Government is a government of the people, for the people and by the people. The genius of our institutions rests in the fact that when the people make a law that is bad they can rectify the error and repeal it. Under our form of government the people have retained the power to correct their mistakes and to modify and change the law as experience and prudence direct. In other words, they have reserved the right to profit by their experience.

Here it may be pertinent to ask if there is any safer place to lodge this great power. The mere suggestion of such a question is a sufficient answer. The freedom of our people rests upon this right and thereby are their liberties made secure.

## III.

## Decisions of this Court.

The leading decisions of this Court which touch the questions involved in the cases at bar sustain the constitutionality of this act.

The decision in the Chicago Warehouse cases, Munn

vs. Illinois, 94 U. S., 113, is directly in point, and it may be observed that the law as laid down in that case promulgates no new doctrine. It simply makes an application of an old and well-established principle of law to new conditions. It applies the doctrine that "under the powers inherent in every sovereignty, a government may regulate the conduct of its citizens towards each other, and, when necessary for the public good, the manner in which each may use his property" to the new condition of affairs in the storing of grain in warehouses in Illinois. The facts in this case satisfied the Court that the Legislature of the State of Illinois found that the public good demanded that the price for storing grain should be regulated by the Legislature. This was applying the old principle of law to the storing of grain, when it was found that the storing of grain was conducted in a new manner and under new circumstances, and in such manner and under such circumstances that the public good demanded that the Legislature take notice thereof and act thereupon.

In our day of new methods, new inventions and appliances, of trusts and combinations, the Legislature and the courts must be constantly appealed to, for the public good, to make new applications of the principles of law. The principles of law never enlarge; they are only carried over and applied to the new developments in the world's progressive march.

In the case of Peik vs. Chicago, &c., Ry. Co., 94 U. S., 176, WAITE, C. J., says:

"In Munn vs. Illinois, *supra*, page 113, and Chicago, Burlington and Quincy Railroad Co. vs. Iowa, *supra*, page 155, we decided that the State may limit the amount of charges by railroad companies for fares and freights, unless restrained by some contract in the charter, even though their income may have been pledged as security for the payment of obligations incurred

upon the faith of the charter. So far this case is disposed of by those decisions."

In the case of Dow vs. Beidelman, 125 U. S., 688, GRAY, J., says :

"In Stone vs. Farmers' Loan and Trust Co., 116 U. S., 307, decided at October Term, 1885, the obligation of a contract created by a charter granting similar powers to a railroad corporation and its directors was held not to be impaired by a statute of Mississippi, establishing a Board of Railroad Commissioners charged with the duty of preventing the exaction of unreasonable or discriminating rates upon transportation done within the limits of the State; and the Chief-Justice said: 'It is now settled in this Court that a State has power to limit the amount of charges by railroad companies for the transportation of persons and property within its own jurisdiction, unless restrained by some contract in the charter, or unless what is done amounts to a regulation of foreign or interstate commerce.'"

The learned Justice closes his opinion (page 692) by saying : "Whether this was the best that could have been done is not for us to decide. Our province is only to determine whether it could be done at all, and under any circumstance. If it could, the Legislature must decide for itself, subject to no control from us, whether the common good requires that it should be done."

In the case of Chicago, &c., Ry. Co. vs. Minnesota, 134 U. S., 455, says BLATCHFORD, J. :

"There being, therefore, no contract or chartered right in the railroad company which can prevent the Legislature from regulating in some form the charges of the company for transportation, the question is whether the form adopted in the present case is valid.

"The construction put upon the statute by the Supreme Court of Minnesota must be accepted by this Court, for the purposes of the present case, as conclusive and not to be re-examined here as to its propriety or accuracy. The Supreme Court authoritatively de-

clares that it is the expressed intention of the Legislature of Minnesota, by the statute, that the rates recommended and published by the Commission, if it proceeds in the manner pointed out by the act, are not simply advisory, nor merely *prima facie* equal and reasonable, but final and conclusive as to what are equal and reasonable charges; that the law neither contemplates nor allows any issue to be made or inquiry to be had as to their equality or reasonableness in fact; that, under the statute, the rates published by the commission are the only ones that are lawful, and therefore in contemplation of law the only ones that are equal and reasonable; and that, in a proceeding for a mandamus under the statute, there is no fact to traverse except the violation of law in not complying with the recommendations of the commission. In other words, although the railroad company is forbidden to establish rates that are not equal and reasonable, there is no power in the courts to stay the hands of the commission if it chooses to establish rates that are unequal and unreasonable.

"This being the construction of the statute by which we are bound in considering the present case, we are of opinion that, so construed, it conflicts with the Constitution of the United States in the particulars complained of by the railroad company. It deprives the company of its right to a judicial investigation, by due process of law, under the forms and with the machinery provided by the wisdom of successive ages for the investigation judicially of the truth of a matter in controversy, and substitutes therefor, as an absolute finality, the action of a railroad commission which, in view of the powers conceded to it by the State court, cannot be regarded as clothed with judicial functions or possessing the machinery of a court of justice."

That is, the Court holds that the Legislature having enacted that the railroad company should charge equal and reasonable rates, the section creating the Commis-

sion, which made the decision of the Commission final, took from the railroad company their right to a judicial determination of what was a reasonable charge, under the terms of their charter, and therefore deprived them of a constitutional right. Had the Legislature in this case fixed a maximum rate of charge, there would have been no difficulty, and the Court would undoubtedly have followed the rule laid down in the Munn case and the other cases above cited. But the Legislature having, as above stated, made the condition in the charter that the terms should be equal and reasonable, then the railroad company were entitled to a judicial determination of the question whether the charges were equal and reasonable. Hence, it cannot be said that this decision practically overrules Munn vs. Illinois, as suggested by MILLER, J., in his dissenting opinion.

It is no answer to this doctrine to say that this legislation may be unwise or unnecessarily oppressive, as was said in Powell vs. Pennsylvania, 127 U. S., 686, by HARLAN, J.: "If all that can be said of this legislation is that it is unwise, or unnecessarily oppressive to those manufacturing or selling wholesome oleomargarine, as an article of food, their appeal must be to the Legislature, or to the ballot-box, not to the judiciary. The latter cannot interfere without usurping powers committed to another department of government.

"It is argued in behalf of the defendant that if the statute in question is sustained as a valid exercise of legislative power, then nothing stands in the way of the destruction by the legislative department of the constitutional guarantees of liberty and property. But the possibility of the abuse of legislative power does not disprove its existence. That possibility exists even in reference to powers that are conceded to exist."

Under the foregoing authorities, it would seem that the question is certainly, so far as the Supreme Court of the United States is concerned, *stare decisis*, and is no longer open to question.

## IV.

## Regulation of Commerce.

The law in question is valid as an act regulating commerce on the waters of the State.

As the Federal Congress has not legislated upon the subject the State has power to do so. The 3d Clause of the 8th Section of the 1st Article of the Constitution of the United States provides that : "That Congress shall have power to regulate commerce with foreign nations," &c.

In the case of Munn vs. Illinois (94 U., S. 135) WAITE, Ch. J., says :

"It was very properly said in the case of the *State Tax on Railway Gross Receipts*, 15 Wall., 293, that 'it is not everything that affects commerce that amounts to a regulation of it within the meaning of the Constitution.' The warehouses of these plaintiffs in error are situated and their business carried on exclusively within the limits of the State of Illinois. They are used as instruments by those engaged in State as well as those engaged in interstate commerce, but they are no more necessarily a part of commerce itself than the dray or cart by which, but for them, grain would be transferred from one railroad station to another. Incidentally they may become connected with interstate commerce, but not necessarily so. Their regulation is a thing of domestic concern, and certainly, until Congress acts in reference to their interstate relations, the State may exercise all the powers of Government over them, even though in so doing it may indirectly operate upon commerce outside its immediate jurisdiction. We do not say that a case may not arise in which it will be found that a State, under

the form of regulating its own affairs, has encroached upon the exclusive domain of Congress in respect to interstate commerce, but we do say that upon the facts as they are represented to us in this record that has not been done."

These remarks apply equally to the business of elevating grain in the State of New York, to which the act under discussion applies. The floating and stationary elevators are situated and their business carried on exclusively within the limits of the State. They are used as instruments by those engaged in commerce, but they are not necessarily a part of commerce.

In the case of Cooley vs. Board of Wardens of the Port of Philadelphia, 12 How. U. S., 299, the Supreme Court of the United States in passing upon the validity of State Pilotage Laws (in this case of Pa.) held that such a law was a "regulation of commerce." The Court then, on page 318, says: "Entertaining these views, we are brought directly and unavoidably to the consideration of the question *whether the grant of the commercial power to Congress did per se deprive the States of all power to regulate pilots?*" The Court then proceeded to review the question at length and held that in the absence of a national law on the subject the State had the right to pass the act in question and that the same is constitutional.

To the same effect is *Ex parte* McNeil, 13 Wall., 236, in which the Court held:

"The statutes of the several States regulating the subject of pilotage are * * * to be regarded as constitutionally made until Congress by its own acts supercedes them."

On p. 240 the Court said:

"In the complex system of polity which prevails in this country, the powers of government may be divided into four classes:

"Those which belong exclusively to the States.

"Those which belong exclusively to the National Government.

"Those which may be exercised concurrently and independently by both.

"Those which may be exercised by the States, but only until Congress shall see fit to act upon the subject. The authority of the State then retires, and lies in abeyance until the occasion for its exercise shall recur."

The same is also held in Wilson vs. McNamee, 102 U. S., 572.

In the State of New York we may refer to the case of Fitch vs. Livingston, 4 Sandford's R., 492, in which the Court held as follows:

"Each State may pass such laws, affecting commerce "to operate within its own limits, not in direct conflict "with the provisions of the Constitution of the United "States, or Acts of Congress, as are necessary for the "preservation of the life, the health, the personal rights "and the property of its citizens, and of those enjoying its protection.

"In such statutes, a State may lawfully add to the "requirements already made by an Act of Congress on "the subject of navigation.

"So far as there is an implied conflict arising from a "State law adding further requisites, or an Act of Congress requiring less than the State law already exacts, "the municipal law of the State must govern, so far as "it falls within the scope of police regulations as above "defined.

"The State laws regulating vessels in ports and harbors, pilotage, the quarantine of vessels, cargoes, and "passengers, wrecks, inspection and auction sales of "foreign goods, and the navigation of its rivers and "lakes fall within the principles before laid down and "depend upon it for their validity."

The Legislature of this State has passed many laws

designed to regulate its commerce. It has enacted navigation laws, laws regulating rates to be charged for wharfage, and for insurance upon the canals (Chap. 455, Laws of 1883), and others of a like nature.

## V.

## Conclusion.

In view of the foregoing facts and authorities can it be said that this law (Chap. 581, Laws 1888) contravenes Article I., Section 6 of the Constitution of the State of New York?

"A statute to be held unconstitutional must be *plainly* at war with the fundamental law."

People *ex rel.* Sinkler vs. Terry, 108 N. Y., 1.

"Every presumption is in favor of the validity of an enactment of the State Legislature, within the provision of legislative powers; and in order to successfully challenge its constitutionality, it is necessary to find some constitutional provision which either restricts or prohibits the exercise of that power in the particular case."

People *ex rel.* Hatfield vs. Comstock, 78 N. Y., 356.

"Every presumption is in favor of the constitutionality of acts of the Legislature. An adverse doubtful construction is not sufficient to condemn an act. It is only in cases of a clear and substantial departure from the provisions of the fundamental law that Courts will declare acts of the Legislature invalid

(55 N. Y., 54; 50 *Id.*, 553; 14 Mass., 340; 17 N. Y., 235; 23 Wend., 166)."

Matter of Gilbert Elevated Railway Co., 70 N. Y., 361 (367).

"Every presumption is in favor of the validity of legislative acts, and they are to be upheld unless there is a substantial departure from the organic law."

People *ex rel.* City of R. *et al.* vs. Briggs *et al.*, 50 N. Y., 553.

Is not this law in perfect harmony with the fundamental law rather than in conflict with it?

Shall the grain commerce of the State and of the great West be diverted from the State of New York to other States and Canadian ports for the sole purpose of enriching a few men who control the elevator trade in the State of New York? Shall a large portion of the people of this State be impoverished in order to foster a gigantic monopoly—a trust? That is the practical, if not the legal, question to be decided here.

These rights of the people, instead of being restricted, should, by a liberal construction of the statute, if necessary, be enlarged. Much of the great prosperity of the State is due directly to its canals.

To continue this prosperity was the aim of the legislators of the State in enacting this law, and not to benefit the boatman alone, as is claimed by the relator's counsel.

The language of BRADLEY, J., in the case below quoted, applies with peculiar force to the grain elevator business. He says:

"Monopolies are the bane of our body politic at the present day. In the eager pursuit of gain they are sought in every direction. They exhibit themselves in corners in the stock market and *produce* market, and in many other ways. * * * If there is no constitutional means of putting a check to such enormity, I

can only say that it is time the Constitution was further amended. In my judgment the present Constitution is amply sufficient for the protection of the people if it is fairly interpreted and faithfully enforced.

Butchers' Union Co. vs. Crescent City Co., 111 U. S., 746.
Opinion by BRADLEY, J., on p. 766.

The judgment of the Court of Appeals of the State of New York should be affirmed.

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